

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 225

WILLIAM MARCUS, ET AL., PETITIONERS,

vs.

**SEARCH WARRANT OF PROPERTY AT 104 EAST
TENTH STREET, KANSAS CITY, MISSOURI, ET AL.**

**ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF MISSOURI**

**FILED JULY 11, 1960
JURISDICTION POSTPONED OCTOBER 10, 1960**

SUPREME COURT OF THE UNITED STATES

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OF THE STATE OF MISSOURI

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[fol. 1]

**IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, AT KANSAS CITY**

DIVISION NO. 9

IN RE: SEARCH WARRANT OF PROPERTY AT
5 WEST 12TH STREET, KANSAS CITY,
MISSOURI No. 1000

IN RE: SEARCH WARRANT OF PROPERTY AT
3105 EUCLID, KANSAS CITY, MISSOURI No. 1001

IN RE: SEARCH WARRANT OF PROPERTY AT
1 EAST 39TH STREET, KANSAS CITY,
MISSOURI No. 1002

IN RE: SEARCH WARRANT OF PROPERTY AT
123 EAST 12TH STREET, KANSAS CITY,
MISSOURI No. 1003

IN RE: SEARCH WARRANT OF PROPERTY AT
104 EAST 10TH STREET, KANSAS CITY,
MISSOURI No. 1004

[fol. 1a]

IN RE: SEARCH WARRANT OF PROPERTY AT
221 EAST 12TH STREET, KANSAS CITY,
MISSOURI No. 1005

[fol. 2]

STIPULATION OF COUNSEL RE RECORD

Loeb H. Granoff, an Assistant Prosecuting Attorney for Jackson County, Missouri, on behalf of the State of Missouri, Morris A. Shenker and Louis Wagner, attorneys for Ted's News Shop, Jack's News Stand, Title News Company, Town Book Store, Ruback's News Stand, Kansas City Distributors and Homer Smay, do hereby stipulate and agree in order to avoid duplicity of exhibits offered in evidence and pleadings filed by Appellants, that the following shall be contained in the transcript of appeal to the Supreme Court of Missouri:

1. Complaint for Search Warrant marked Exhibit "F", attached hereto.

2. Copy of Search Warrant authorizing search for property, and return thereon signed by Deputy Sheriff John Weinberg, marked Exhibit "Q", and attached hereto.

3. Copy of Notice of Circuit Court hearing, marked Exhibit "H", attached hereto.

4. Copies of inventories of property seized from each of the six Appellants herein.

5. Amended Motion for Immediate Return of Property Seized and to Quash Search Warrant of Ted's News Shop and Jack K. Rayburn.

It is further stipulated and agreed that Exhibits "F", "Q", "H", and Amended Motion aforesaid are identical, in all respects for purposes of appeal, to each of the com-[fol. 3] plaints, search warrants, returns, notices of hearing and motions filed in each of the above cases, except as to the names and addresses of the parties and the inventories applicable to each, and may be so considered by the Supreme Court of Missouri, in lieu of the original corresponding documents and pleadings in each case.

"EXHIBIT F" TO STIPULATION

COMPLAINT FOR SEARCH WARRANT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

On this 10th day of October, 1957, personally appeared before me, Ben Terte, circuit judge of Jackson County, Missouri, one Charles J. Coughlin, who being duly sworn, upon his oath complains and states of his own knowledge that on the 8th day of October 1957 on the premises and in the building known, designated, and described as the Kansas City News Distributors, also known as Curtis Circulation Company, consisting of a newspaper, book and

magazine wholesale sales and store room situated on the first floor rear of a brick building and a basement, all located at 3105 Euclid, the said premises and building being in Kansas City, Jackson County, Missouri, certain persons, whose names are unknown to the said Charles J. Coughlin, have kept for the purpose of selling, publishing, exhibiting, giving away, or otherwise distributing or circulating obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, [fol. 4] immoral and scandalous character.

/s/ Charles J. Coughlin. Subscribed and sworn to before me this 10th day of October 1957.

/s/ Ben Terte, Judge.

"EXHIBIT Q" TO STIPULATION

**SEARCH WARRANT AUTHORIZING SEARCH
FOR PROPERTY**

(Complaint under Form No. 38)

Obscene

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

IN THE CIRCUIT COURT OF JACKSON COUNTY

DIVISION No.

**THE STATE OF MISSOURI TO ANY PEACE OFFICER
IN THE STATE OF MISSOURI:**

WHEREAS a complaint in writing, duly verified by oath, has been filed with the undersigned Judge of this court, stating upon information and belief that heretofore the following described personal property, to-wit: obscene, lewd, licentious, indecent, and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral

and scandalous character, has been unlawfully kept and deposited, and that said property is being kept or held in this county and state at and in first floor display, retail sales, and store room, first floor rear storage room and basement; of a two story stone and concrete building located at 123 East 12th Street, Kansas City, Missouri, Jackson County, Missouri, known, designated and described as Town Book Store and,

[fol. 5] WHEREAS, the Judge of this Court from the sworn allegations of said complaint and from the supporting written affidavits filed therewith has found that there is probably cause to believe the allegations of the complaint to be true and probable cause for the issuance of a search warrant herein;

NOW THEREFORE, these are to command you that you search the said premises above described within 10 days after the issuance of this warrant by day or night, and take with you, if need be, the power of your county, and, if said above described property or any part thereof be found on said premises by you, that you seize the same and take same into your possession, making a complete and accurate inventory of the property so taken by you in the presence of the person from whose possession the same is taken, if that be possible, and giving to such person a receipt for such property, together with a copy of this warrant, or, if no person be found in possession of said property, leaving said receipt and said copy upon the premises searched, and that you thereafter return the property so taken and seized by you, together with a duly verified copy of the inventory thereof and with your return to this warrant to this court to be herein dealt with in accordance with law. Witness my hand and the seal of this court on this 10th day of October 1957.

s/ BEN TERTE
Judge of Said Court

[fol. 6] **RETURN AND INVENTORY**

I, John Weinberg, being a peace officer within and for the aforesaid county, to-wit: Jackson, do hereby make return to the above and within warrant as follows: that on the 10th day of October 1957, and within ten days after issuance of said warrant, I went to the location and premises described therein and searched the same for personal property described therein, and that upon said premises I discovered the following personal property described in the warrant which I then and there took into my possession (here inventory of property taken): 4,438 Sex Books, Magazines, Sets of Pics, as listed on exhibit A attached hereto and made a part hereof; that I made this inventory in the presence of the person from whose possession I took said property; that I delivered to such person a receipt for the property taken, together with a copy of this warrant; that I have now placed said property so taken in the possession of this court.

/s/ John Weinberg

Subscribed and sworn to before me this 14th day of Oct., 1957. /s/ Francis M. Cook—Clerk; James F. Moriarty, Dep. Clerk.

"EXHIBIT H" TO STIPULATION

NOTICE OF CIRCUIT COURT HEARING

TO WHOM IT MAY CONCERN:

TAKE NOTICE that on Thursday, October 17, 1957, 9:30 A.M., hearing will be had pursuant to Mo. Rev. Stat., 1949, Sec. 542.400, before the Hon. Ben Terte, circuit judge in and for Jackson County, Missouri, on the 6th floor, Jackson County Court House, 12th and Oak, Kansas City, Missouri, [fol. 7] to determine whether the following property, seized pursuant to warrant on October 10, 1957, at 123 East 12th Street, Kansas City, Missouri, constitutes obscene, lewd, licentious, indecent or lascivious material within the meaning and intent of Mo. Rev. Stat., 1949, Sec. 542.380, paragraph (2) and, as such, is subject to destruction by burning or otherwise pursuant to Mo. Rev. Stat., 1949, Sec. 542.420, to-wit:

EXHIBIT A TO NOTICE OF CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

OCTOBER 10TH, 1957

By authority of Search Warrant issued by
, Judge of Division, Circuit Court of Jackson
 County, Missouri, the following articles were seized from
 Town Book Shop, located at 123 East 12th Street, and re-
 ceipt is hereby given.

Number

95	Nudist Year Book	2	Mr.
21	Figurette	20	Relax.
43	Fling	57	Playboy
	Sun Magazine	443	Adam
	Fads and Fancies	21	Satan
76	Sunbathing Review	51	Escapade
6	Figure Studies		
	Annual	38	Scamp
50	Sunbathing	35	Dude (The)
	Jester	82	After Dark

[fol. 8]

18	Figure	84	Nuget (Nugget)
57	Sir	31	Caper
84	Rex	23	Life Study

19 21 Annual
 45 Gent

Miscellaneous

77	Jem	17	Duke	11	Body Beaut.
16	Gay Blade	152	(Sets) Photos	27	Photo Arc.
20	Pose	5	Playboy Books	18	Bed Side
61	After Hours	41	Cabaret	5	Unusual Mod.
2	Rogue	29	Showplace	2	Rose Mary
59	Man (Modern)	33	Art Camera	2	Kim White
29	High	6	Sexology	53	Misc. Sex Bks.
	Gala	108	Playboy (Cal.)	496	Blue Books
18	Ho	13	Mod. Sex	1699	Misc. Sex Mag.
20	Monsieur	18	Popular Man	(1699)	

Received by: Sheriff's Office

By John Weinberg
- Investigator -

4,438

/s/ Ben Terte, Judge

Dated this 11th day of October, 1957

(The following inventories are copied herein completely, but the notices to which they were attached are not set forth, in line with the stipulation heretofore set out.)

[fol. 9]

EXHIBIT A TO NOTICE OF CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

OCTOBER 10, 1957

By authority of Search Warrant issued by Ben Terte, Judge of Division 9, Circuit Court of Jackson County, Missouri, the following articles were seized from Ted's News & Book Shop, located at 221 East 12th St., and receipt is hereby given.

<i>Number</i>	
	Nudist Year Book
10	Figurette
11	Fling
12	Sun Magazine
7	Fads and Fancies
1	Sunbathing Review
	Figure Studies
	Annual
	Sunbathing
	Jester
	Figure
37	Sir
6	Mr.
	Relax
20	Playboy 36
	Calendars
98	Adam
	Satan
25	Escapade
13	Scamp
20	Booze (The)
32	After Dark
30	Nugget (Nugget)
17	Caper

Number

- 22 Rex
- 13 21 Annual
- Gent
- 23 Jem
- 11 Gay Blade
- 5 Pose
- 20 After Hours

[fol. 10]

- 4 Rogue
- 21 Man (Modern)
- 4 High
- 5 Gala
- Ho
- 1 Monsieur

- 24 Showplace
- 8 Facts
- 10 Act Medical
- 4 Bare
- 5 Harem
- 2 Psychology
- 9 Art & Camera
- 8 Photo Exhibits
- 6 Picture Annual
- 4 Follies
- 3 Glamour Parade
- 2 Womans Life
- 6 Your Personality
- 11 " Health
- 8 Real Life Guides
- 6 Your Life
- 4 Tomorrow's Men
- 10 Vim

- 11 Life Study

Miscellaneous

- 5 True—Page 57
- 10 Photography
- 3 Dukes
- 16 Master Photography
- 15 Photo Arcade
- 11 He
- 26 Exotique
- 2 Sexology
- 18 Frolic
- 15 Prof. Photography

Received by: Robert Copeland

- 2 Playboy Annuals

[fol. 11]

Number

- 5 Body Beautiful
- 8 Adonis
- 10 Popular Man
- 8 Joker
- 3 Jest
- 4 Comedy

EXHIBIT A TO CIRCUIT COURT HEARING**KANSAS CITY, JACKSON COUNTY, MISSOURI****OCTOBER 1957**

By authority of Search Warrant issued by _____
 _____, Judge of Division _____, Circuit Court of Jackson
 County, Missouri, the following articles were seized from
 Title News Shop, located at 104 East 10th St., and receipt
 is hereby given.

Number

- | | |
|---------------------|-----------------------|
| Nudist Year Book | 2 Sex Control |
| 6 Figurette | 9 Playboy Calendars |
| Fling | 1 Are you Over Sixty |
| 2 Sun Magazine | 1 Open at Your Risque |
| Fads and Fancies | 22 Playboy |
| 1 Sunbathing Review | Adam |
| Figure Studies | |
| Annual | Satan |
| 17 Sunbathing | 5 Escapade |
| Jester | 2 Scamp |
| 1 Figure Photo | 6 Dude (The) |
| | |
| | 14 After Dark |
| | 4 Nugget (Nugget) |
| | 5 Capers |
| | 1 Naked & Unashamed |
| | 1 American Aphrodite |

[fol. 12]

- 9 Sir
- 9 Rex
- 21 Annual
- 5 Gent
- 1 Jem

*Number**Gay Blade*

- 10 Pose
- After Hours
- 3 Rogue
- 12 Man (Modern)
- 4 High
- 2 Gala
- 1 Its Only Natural
- 1 Daisy Fannie
- 16 Post Cards
- 1 Chastity Girdles
- 6 Exotique
- 1 Sex Perversion & Love
- 2 Jest on Sex
- 1 (Unintelligible)

- 4 Good Phot.
- 3 Glamour Phot.
- 5 Creative Phot.

[fol. 13]

- 1 Handbook Phot.
- 5 Photo Annual
- 4 Female Phot.
- 1 Prizewinner Phot.
- 1 Phot. Studies
- 1 Camera in Paris
- 4 Art & Camera
- 2 Screen & Photo
- 2 Camera
- 4 Life & Study
- 1 Figure
- 3 Artists Models

Miscellaneous

- 7 Professional Phot.
- 4 Man
- 5 Duke
- 1 Female Figure
- 2 Champ
- 7 Master Phot.
- 2 Great Phot.
- 2 Man Annual
- 3 Peep Show
- 4 Photo Exibt
- 4 Figure Quarterly
- 3 Males

Received by:

Sgt. L. P. Smith #3

10-10-57

1:00 p.m.

- 1 Frenchie
- 1 Model Magnifique
- 7 Dare
- 10 She
- 5 Marriage Sex
- 6 Showplate
- 3 The Mountain Boys
- 4 Quick
- 2 Art of Love
- 1 Amorus Intrigue
- 1 Fun
- 1 Breezy
- 2 Pepper
- 10 Comic Jokes 25¢
- 12 Comic Jokes 35¢

Number

1 Graphic Models
 4 Photo
 1 Photo Art
 3 T N T
 6 Unusual Models
 4 Art Studies
 3 Bare
 10 People
 2 Dixie Sparkle
 3 Rosemary Clark

3 Quick
 1 Mating Manual
 1 Vue
 1 Scope
 2 Revealed
 5 Frolic
 4 Glamour Parade
 6 Off Limits
 1 Photo Ideas
 1 Night Beat
 1 Dance Hall to White
 Slavery
 1 Aunt Sally Policy #
 Dream Book

[fol. 14]

s/ Sgt. L. P. Smith

s/ Ptl. Glenn Gibson

s/ Cpl. Harold O. Sharon

K. C. NEWS 3105 Euclid

100 Showplace	25 After Dark
51 For Men Only	25 Lowdown
50 Figure Photography	25 Caper
125 Figure Quarterly	25 Models Studies
25 Photo Exhibit	50 Modern Man Annual
100 Modern Man Annual	25 21 Annual
75 Hep	25 Cabaret Quarterly
497 Playboy (Oct)	20 Figure Studies
28 Playboy (Sept)	25 Figure Quarterly
68 Professional Photog.	25 Lowdown
25 Nudist Yearbook	150 Modern Man
100 Stag	25 Sunbathing Review
50 Whisper (Dec)	13 Model Man Quarterly

150	Nite & Day	12	Model Man Quarterly
309	Photog. (Creative)	100	Adam
50	Whisper (Dec)	51	After Hours
100	Nudist Yearbook	25	Modern Man
100	Modern Man Annual	11	Sexology
50	Nugget	25	Adam
50	Real Man	50	Adam
[fol. 15]			
50	Figure Studies	100	Escapade
100	Adam	50	Classic Photography
75	Gem	11	Classic Photography
50	Nugget	25	Lens
20	Life Study	6	Sunbathing Review
25	Real Men	6	Model Studies
50	Sunbathing Review	9	Figure Quarterly
74	Nugget	13	Lens
1	Caper	10	Color Annual
125	Whisper	7	21 Annual
25	Lowdown	21	Adam
7	Adam	25	Lens
21	Photo Exhibit	100	Figure
8	American Sunbather	90	Nudist Yearbook
150	Nudist Yearbook	3	Fairer Sex
3	Bronz Thrills	9	Gala
20	Modern Men's World	29	Jem
15	Modern Men	75	Whisper
12	Modern Man	8	Pictorial Annual
8	Breezy	5	After Dark
42	Sir Annual	11	Lowdown
14	Caper	5	Sunbathing for Health
12	Gay Blade	2	Adonis
2	Body Beautiful	2	On the QT
3	Amature Art & Camera	3	Harem

[fol. 16]

2	Jive	2	Smiles
3	Modern Man Annual	2	Pepper
1	Scamp	3	TV Girlie Gags
1	Paris Life	2	Inside
2	Rex	6	Cabaret Quarterly
1	Eye Opener	8	Glamour Parade
1	Photo Annual	7	Cabaret Quarterly
2	Monsieur	8	Model Studies Annual
1	Model Studies	1	Pose
1	Male Points	1	Checks & Chuckles
1	She	1	Bold
1	Quick	1	Dare
1	Brave	1	Tempo
1	Share	1	He
3	Bare	2	Ho
2	High	4	Joker
8	Nifty	7	Fotorama
3	TNT		

K. C. News

EXHIBIT A TO CIRCUIT COURT HEARING**KANSAS CITY, JACKSON COUNTY, MISSOURI****OCTOBER 1957**

By authority of Search Warrant issued by Ben Terte, Judge of Division 9, Circuit Court of Jackson County, Missouri, the following articles were seized from Jack's Newsstand, located at 1 E. 39th, K. C., Mo., and receipt is hereby given.

[fol. 17]

Number

- 1 Nudist Year Book
Figurette
Fling

- Mr.
Relax
30 Playboy

Number

- 7 Sun Magazine
Fads and Fancies
25 Sunbathing Review
14 Figure Studies
Annual
6 Sunbathing
Jester
25 Figure
14 Sir
20 Rex
21 Annual
24 Gent
4 Jem
Bay Blade
29 Pose
2 After Hours
4 Rogue
103 Man (Modern)
7 High
4 Gala
Ho
Monsieur
[fol. 18]
7 Stare

- 22 Adam
Satan
8 Escapade
8 Scamp
32 Dude (The)
35 After Dark
37 Nugget (Nugget)
40 Caper
Life Study

Miscellaneous

- 14 Photography Annual
4 Bronze Thrills
34 Cabaret
42 Master Photography
16 Pack O'Fun
14 Vue
17 Sexology
26 Nifty
21 Scope
10 Picture Digest

Received by:

Gerald Bean JCSP
Cpl. Ray Colman KCPD
Victor Loecze KCPD

- 13 Jest
9 Backstage Follies
7 Pic

- 11 Glamour
Photography
1 Female Thighs &
Nudes
6 Over Sixteen

Number

- | | | | |
|-----------|--------------------------|----|---------------------------|
| 4 | X Citement | 1 | Spice Thats Nice |
| 14 | Comedy | 2 | Sexual Symbolism |
| 21 | Breezy | 1 | Jest on Sex |
| 16 | Gee Whiz | 2 | Abnormal Sex Behavior |
| 18 | Snappy | 16 | Photography |
| 5 | Zip | 1 | Lets Play Doctor |
| 18 | Gaze | 1 | Use your Own Couch |
| 9 | Laff Book | 1 | Sex Deviations |
| 9 | Wham | 6 | Camera In Paris |
| 1 | Foto Rama | 3 | Creative Pictures |
| 6 | Fun | 1 | Sex Life In Marriage |
| 26 | Joker | 42 | Misc. Photography books |
| 17 | Tab | 18 | Photographers' Show Place |
| 13 | Classic Photography | 2 | Jive |
| 3 | Tan | 3 | Hep |
| 31 | Professional Photography | 5 | Pin Ups |
| 12 | Model Studies | 6 | Paris Life |
| 4 | Screen Photography | 18 | Life Study |
| [fol. 19] | | 1 | Naked Body |
| 5 | Man to Man | 12 | Frolic |
| 1 | Nus — | 8 | Nite & Day |
| 4 | Sunbathing Annual | 1 | Photography Handbook |
| 1 | Pep Show | 3 | Art & Camera |
| 1 | Glamor Parade | 1 | Figure Photography |
| 10 | Modern Sunbathing | | |
| 13 | Glamor Photos | | |

EXHIBIT A TO CIRCUIT COURT HEARING

KANSAS CITY, JACKSON COUNTY, MISSOURI

October 10, 1957

By authority of Search Warrant issued by Ben Terte, Judge of Division 9, Circuit Court of Jackson County, Missouri, the following articles were seized from Rubach's News Stand, located at 5 W. 12th, K.C., Mo. and receipt is hereby given.

<i>Number</i>	
21	Nudist Year Book
0	Figurette
93	Fling
0	Sun Magazine
0	Fads and Fancies
57	Sunbathing Review
3	Figure Studies
	Annual
46	Sunbathing
0	Jester
34	Figure
[fol. 19a]	
65	Sir
50	Rex
0	21 Annual
17	Gent
41	Jem
0	Gay Blade
50	Pose
39	After Hours
0	Rogue
0	Mr.
0	Relax
80	Playboy
475	Adam
0	Satan
49	Escapade
0	Scamp
41	Dude (The)
66	After Dark
88	Nuget (Nugget)
34	Caper
17	Life Study
	<i>Miscellaneous</i>
90	small paper back magazines 10¢
10	envelopes—163 package photos
50	pkgs wallet size comic cards
188	3 x 5 books 10¢ mod- ern photography
6	sun bather 36 frolic—
36	photographer

Number
17 Man (Modern)

26 High
0 Gala

5 Ho
0 Monsieur

Miscellaneous
Show Place 50 She—
12 photography
handbook

16 art & camera—11
peep show—3 Good
Photography—9 fig-
ure photography
5 Prize Winning Pho-
tography 9 mens
World—6 Valor—21
Stag—2 Glamor

Parage—5 Gusts—19 Queen
of Hearts 9 Carol Haze—6
Meet the Girls—104 assorted
50¢ magazines—31 Hard
Back Sex Books.

Received by:

Lt. B. P. Morton -s-

J.C.S.P.

[fol. 20]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

AMENDED MOTION OF TED'S NEWS SHOP AND JACK K. RAYBURN
FOR IMMEDIATE RETURN OF PROPERTY SEIZED AND TO QUASH
SEARCH WARRANT—Filed October 31, 1957

Ted's News Shop and Jack K. Rayburn move the Court
for the immediate return of the property seized under the
purported authority of a search warrant issued by Judge
Ben Terte on October 10, 1957, to search the premises at
221 East 12th Street, Kansas City, Missouri. Movants also
move the Court to quash the search warrant and to sup-
press as evidence the property seized. The grounds for this
motion are as follows:

(1) Ted's News Stand is engaged in the distribution of nationally distributed periodicals and magazines at 221 East 12th Street, Kansas City, Missouri.

(2) Jack K. Rayburn is its manager.

(3) On October 10, 1957, Charles J. Coughlin filed a complaint for a search warrant in this Court which alleged in part that on the 9th day of October, 1957, in movants' premises "certain persons, whose names are unknown to the said Charles J. Coughlin, have kept for the purpose of selling, publishing, exhibiting, giving away, or otherwise distributing or circulating obscene, lewd, licentious, indecent and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles or publications of an indecent, immoral, and scandalous character."

(4) On October 10, 1957, this Court issued a search warrant directed to any peace officer in the State of Missouri [fol. 21] which recited that a complaint had been filed stating "that the following described personal property, to-wit: obscene, lewd, licentious, indecent, and lascivious books, pamphlets, papers, drawings, lithographs, engravings, pictures, prints and other articles, or publications of an indecent, immoral and scandalous character has been unlawfully kept and deposited" on the premises at 221 East 12th Street, and commanding a search of the described premises within 10 days by day or night and "if said above described property or any part thereof be found on said premises by you, that you seize the same and take some into your possession."

(5) On October 10, 1957, police officers and deputy sheriffs went to the premises at 5 West 12th Street, made a determination of what property came within the description of the warrant and seized numerous periodicals, magazines and other publications.

(6) The articles seized are the property of movants.

(7) Section 542.380 and Section 542.400 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of Missouri, under which sections and rule the said warrant was issued,

are unconstitutional by allowing a search warrant to be issued and the property set forth in Section 542.380 (2) seized *ex parte* without notice and without any hearing afforded to the owners of the property prior to such seizure, for the reason that it allows a search and seizure of books, pamphlets, and the other publications specified in Section 542.380 (2) without notice or any hearing afforded to the [fol. 22] owners of the property prior to seizure, for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious or of an immoral or scandalous character, and therefore constitutes a prior restraint or censorship of said publications, impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution; the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(8) Section 542.380 and Section 542.400 R. S. Mo., 1949, and Rule 33 of the Rules of the Supreme Court of Missouri, under which sections and rule the instant warrant was issued, are unconstitutional as applied in this case for the reason (a) that it allowed movants' periodicals and magazines to be seized by police officers and deputy sheriffs without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious, or of an immoral or [fol. 23] scandalous character, (b) that it allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which of movants' periodicals and magazines were "obscene, lewd, licentious, indecent and lascivious" or were of an "indecent, immoral and scandalous character" and were subject to seizure, impairing movants' freedom of speech and pub-

lication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(9) The search warrant was improper upon its face because it is not directed to a person or persons by name, but to a class, and is not directed to any particular peace officer or officers as required by Rule 33.01 of the Rules of the Supreme Court of Missouri.

(10) The search warrant was illegally issued because the complaint for its issuance and the warrant itself did not contain a description of the personal property to be searched for and seized in sufficient detail and particularly [fol. 24] to enable the person serving the warrant to readily ascertain and identify the same and thereby violated Rule 33.01 (b) of the Rules of the Supreme Court of Missouri and further did not describe the things to be seized as nearly as may be making the search and seizure unreasonable in violation of Article I, Section 15 of the Missouri Constitution.

(11) The search warrant was illegally issued because it was issued without a finding by the Court that there was probable cause or reasonable grounds for its issuance and there was no proper showing of probable cause and therefore the search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(12) The property seized is not the type of property whose seizure is authorized by any statute of this State.

(13) The search warrant was illegally issued because it authorized a search and seizure of movants' magazines and publications prior to distribution and thereby consti-

tuted a prior restraint or censorship of said magazines and publications impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of speech and press deprived movants of privileges and immunities as a citizen and property without due process of law as guaranteed by the privileges and immunities and due process clause of Amendment XIV of [fol. 25] the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(14) The magazines and publications seized are not obscene or otherwise subject to penalty by statute and their seizure impaired movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of speech and press deprived movants of privileges and immunities as a citizen and property without due process of law as guaranteed by the privileges and immunities and due process clause of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(15) The search warrant was illegally issued because the complaint alleges insufficient facts and it is not supported by evidential facts from which a Court could determine the existence of probable cause and thereby violated Rule 33.01 (a) of the Rules of the Supreme Court of Missouri.

(16) The search warrant is void because (a) it constitutes a general warrant to search and seize; (b) it is improper and insufficient on its face; (c) the complaint for its issuance is not in the proper form prescribed by statute, [fol. 26] Rule 33 of the Supreme Court Rules and Article I, Section 15 of the Missouri Constitution, and does not contain the necessary elements needed for the issuance of a valid search warrant; (d) the complaint for its issuance

and the search warrant itself do not state facts constituting probable cause for its issuance; (e) the complaint for the issuance and the search warrant itself state mere conclusions and do not particularize any alleged violations of the law which would authorize its issuance; (f) it does not prescribe a definite time for its execution; (g) Section 542.380 R. S. Mo., 1949, is unconstitutional for the reason that it authorized a Clerk of the Court to issue a search warrant and thereby allows a search warrant to issue without a judicial finding of probable cause in contravention of Article I, Section 15 of the Missouri Constitution; (h) it was issued without proper oath and affirmation as required by Article I, Section 15 of the Constitution of the State of Missouri, as required by the Statutes of Missouri, particularly Section 542.380 R. S. Mo. 1949, and as required by Rule 33 of the Rules of the Supreme Court of Missouri; (i) it authorized a search at night time, and (j) it authorized a search within ten days after its issuance.

(17) That there was not probable causes for believing the existence of the grounds on which the warrant was issued.

(18) That the search and seizure were undertaken without probable cause.

(19) That the articles seized were not described in the [fol. 27] warrant and that the officers were not otherwise lawfully privileged to seize the same.

(20) That the warrant was improperly executed in that (a) the articles seized were not subject to seizure under any statute of Missouri, and (b) the articles seized were not subject to seizure under the freedom of speech and press clause of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution and the seizure thereby impaired movants' right of freedom of speech and press as guaranteed by these clauses. Such impairment of speech and press deprived movants of privileges and immunities as a citizen and property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United

States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(21) By reason of each and every ground heretofore enumerated said search and seizure and said search warrant were unreasonable and violative of movants' rights under Article I, Section 15 of the Missouri Constitution and the due process clause of Amendment XIV of the United States Constitution.

(22) By reason of each and every ground heretofore enumerated and by reason of the unreasonable search and seizure movants are compelled to testify against themselves [fol. 28] in violation of the self-incrimination clause of Article I, Section 19 of the Missouri Constitution.

[fol. 29]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Transcript of Trial—October 23, 1957

The trial began on Wednesday, October 23, 1957, before the Honorable Ben Terte, Judge of Division No. 9, of the Circuit Court of Jackson County, Missouri, at Kansas City.

The State was represented by Earl H. Schrader, Jr., and Loeb H. Granoff, its attorneys.

The defendants were represented by Morris A. Shenker, Sidney M. Glazer, Bernard J. Mellman, Louis Wagner, and Lawrence Brown, their attorneys.

The following proceedings were had:

LIST OF TITLES OF PUBLICATIONS OF STATE'S EXHIBITS

Mr. Schrader: Let the record show that the reporter has been asked to mark "Playboy Annual" as State's Exhibit Number 1. And "The Best From Playboy" as State's Exhibit 2. And "Cabaret Quarterly, Volume 6," as State's Exhibit 3. And "Modern Man, Volume 7," as Exhibit 4. And "Sir Annual, Winter 1957," as Exhibit 5. And "Photographs Showplace, November 1957," as Exhibit 6. And

"Hep, October 1957," as Exhibit 7. And "Lens"—L-e-n-s—"October 1957," as Exhibit 8.

And "Lowdown, November 1957," as Exhibit 9.

And "Gay Blade, October 1957," as Exhibit 10.

And "Scamp, November 1957," as State's Exhibit 11.

"Paris Life, December 1957," as State's Exhibit 12.

"Rex, October 1957," as Exhibit 13.

And "Eye Opener, Number 3," State's Exhibit 14.

[fol. 30] And "For Men Only," State's Exhibit 15, December.

State's Exhibit 16, "Adonis, November 1957."

State's Exhibit 17, "Tempo, November 1957."

Eighteen, "Dare, October 1957."

Nineteen, "Quick, October 1957."

Twenty, "Bold, November 1957."

Twenty-one, "Figure," State's Exhibit 21. "Autumn."

Twenty-two, "He, November 1957."

Twenty-three, "Monsieur, October 1957."

Twenty-four, "Brave, November '57."

Twenty-five, "Model Studies, Volume 9."

Twenty-six, "Adam, Volume 9."

Twenty-seven, "Stag, November '57."

Twenty-eight, "Adam, Volume 11."

Twenty-nine, "Figure—Figure Quarterly, Summer Edition."

Thirty, "21 Annual."

Thirty-one, "Photography No. 2." "Photography No. 2" is No. 31. "Creative Photography."

"Photo Exhibit," 32. "November '57."

Thirty-three, "Real Men, December."

"Playboy, September Issue," No. 34.

"Playboy, October Issue," 35.

"Fair Sex," No. 36.

"Classic Photography, Autumn Issue," 37.

"Gala"—G-a-l-a—"November Issue," No. 38.

[fol. 31] "Sunnbathing For Health Magazine, October Issue," No. 39.

"Ho," is 40, "November Issue."

Forty-one, "High," H-i-g-h, "December Issue."

Forty-two, "Nugget, October Issue."

Forty-three, "Joker, December Issue."

- Forty-four, "Nifty, December Issue." N-i-f-t-y.
 Forty-five, "Harem, November Issue."
 Forty-six is "Bare, November Issue."
 Forty-seven is "Master Photography, Winter Issue."
 Forty-eight, "Chicks and Chuckles, October Issue."
 Forty-nine, "October Issue, She." S-h-e.
 Number 50, "Breezy, December Issue." B-r-e-e-z-y.
 Number 51, "Figure Studies, No. 10."
 Number 52, "Amateur Art and Camera, Winter."
 Number 53, "Gem"—G-e-m—"December Issue."
 Number 54 is "Night and Day, October Issue."
 Number 55 is "Adam, No. 11."
 Number 56, "Professional Photography."
 Number 57, "Modern Man Quarterly, Fall Edition."
 Fifty-eight, "Special Issue, Inside, September."
 Fifty-nine, "Modern Man, October Issue."
 Sixty, "Sunbathing and Nudist Leader, October Issue."
 Sixty-one, "After Dark, December Issue."
 Sixty-two, "After Hours, Volume 1, No. 4."
 Sixty-three is "Figure Photography."
 [fol. 32] Sixty-four is "Modern Sunbathing, Nudist Year-
 book, No. 5."
 Sixty-five is "Life Study, No. 12."
 Sixty-six is "Glamor Parade, December Issue."
 Sixty-seven, "Fotorama." F-o-t-o-r-a-m-a—"November
 Issue."
 Sixty-seven-a, "Bronze Thrills, October Issue."
 Sixty-eight, "Picture Annual."
 Sixty-nine, "Smiles, December Issue."
 Seventy, "Jive"—J-i-v-e—"October Issue."
 Seventy-one, "Whisper, December Issue."
 Seventy-two, "Nugget, November Issue."
 Seventy-three is "Pepper"—P-e-p-p-e-r—"December Is-
 sue."
 Seventy-four, "Modern Man, Volume 6."
 Seventy-five is "Sexology, October Issue."
 Seventy-six, "Playboy, October Issue."
 Seventy-seven, "Photo Ideas, No. 1."
 Seventy-eight, "Photo Annual, '57."
 Seventy-nine is "TV Girls and Gags"—G-a-g-s—"Novem-
 ber Issue."

Eighty is "Pose"—P-o-s-e—"October Issue."

Eighty-one is "Male Point of View, November Issue, How to be a Beast with women."

Eighty-two, "Annual, September '58, Photographers' Annual."

[fol. 33] Eighty-two-a, "Fads and Fancies, Utopia No. 5."

Eighty-three, "Scamp, November Issue."

Eighty-four is "Gent, October Issue, 1957."

Eighty-five, "Fads and Fancies, No. 2 Utopia."

Eighty-six is "Photography Color Annual, 1957."

Eighty-seven is "Amorous Intrigue, Venial Sin," book.

Eighty-eight, "T.N.T., October 1957."

Eighty-nine, "From Dance Hall to White Slavery."

Ninety is "The Art of Love, Cyrano de Bergerac."

Ninety-one, "Chastity Girdles."

Ninety-two, "Sunbather, October 1957."

Ninety-three, "Night Beat, December '57."

Ninety-four, "Amateur Screen and Photography, Autumn."

Ninety-five, "Figure Studies Annual, No. 10."

Ninety-six, "Foto Art, Volume 4, No. 6."

Ninety-seven, "Graphic Models, No. 6."

Ninety-eight, "Artists' Models, No. 6."

Ninety-nine, "Life Study, No. 12."

One hundred is "Darling Diana."

One hundred one, "Picture Scope"—S-c-o-p-e—"November."

One hundred two, "Sunbathing For Health Magazine, October."

One hundred three, "Fling, No. 4."

One hundred and four, "Off Limits, Fall 1953."

[fol. 34] One hundred five, "Off Limits, Summer, '53."

One hundred six, "Beauty Contest."

One hundred seven, "Vue, November."

One hundred and eight, "Pose"—P-o-s-e—"November."

One hundred and nine, "Ho, The Long Magazine, November."

One hundred and ten is "Rex, Man About Town, November."

One hundred and eleven, "After Hours, Volume 1, No. 4."

One hundred and twelve, "Foto." F-o-t-o.

One hundred and thirteen, "Dude, November 1957."
D-u-d-e.

One hundred and fourteen, "Modern Sunbathing; October
'57."

One hundred and fifteen, "Frolic, December."

One hundred and sixteen, "Caper." C-a-p-e-r. November.

One hundred and seventeen is "Monsieur." M-o-n-s-i-e-u-r.
October.

One hundred and seventeen-a. That is "24 Annual." '56
and '57.

One hundred and eighteen, "Gala." G-a-l-a. November.

One hundred and nineteen, "Quick." Q-u-i-c-k. German
publication.

One hundred and twenty, "Champ, November."

One hundred twenty-one, "Adam, No. 10."

One twenty-two, "Valor." V-a-l-o-r./December.

One twenty-three, "Stag, November."

[fol. 35] One twenty-four, "Bonnie."

One twenty-five, "The Facts of Rejuvenation, Little Book
No. 648."

One twenty-six is "College Laughs." L-a-u-g-h-s.

One twenty-seven, "Unusual Models, No. 2."

One twenty-eight, "Postcards."

One twenty-nine is "Confidential Chats with Wives, No.
645."

One thirty, "French Cartoons and Cuties, November."

One thirty-one, "Army Fun, November; December."

One thirty-two, "Bizarre." B-i-z-a-r-r-e. "No. 20."

One thirty three, "Exotique." E-x-o-t-i-q-u-e. "No. 6."

One thirty-four, "Gallery, Volume 3."

One hundred thirty-five, "Amateur Art and Camera,
Winter." 3

One thirty-six, "Sir, December."

One thirty-seven, "Figure, Quarterly."

One thirty-eight, "Her Burning Secret, 817, Little Blue
Book."

One thirty nine, "Zip." Z-i-p. November.

One forty, "Girly Gags, December."

One forty-one is "Broadway Laughs, November-Decem-
ber."

One forty-two, "Nifty," for December.

- One forty-three, "Modern Glamour Gal, Series No. 1."
 One forty-four, "Presenting Brandee Kayse." K-a-y-s-e.
 [fol. 36] One forty-five, "Girls Beautiful, No. 25."
 One forty-six, "The Third Dimension Photo, No. 1."
 One forty-seven, "Chorus Girl and Lover's Wife."
 One forty-eight, "Sexological Dictionary."
 One forty-nine, "The Dawn of Rational Sex Ethics."
 One fifty, "Sex Symbolism."
 One fifty-one, "Notes on Cases of Sexual Suppression."
 One fifty-two, "Your Affections, Emotions and Feelings."
 One fifty-three, "Strange Loves."
 One fifty-four is "Sexual Impotence, Its Causes and Treatments."
 One fifty-five, "The White Slave Traffic."
 One fifty-six, "Are You Sexually Attractive?"
 One fifty-seven, "The Fleece of Gold."
 One fifty-eight, "The Confessions of a Modern Woman."
 One fifty-nine, "Her Burning Secret."
 One sixty, "When Youth Burns."
 One sixty-one, "Sex and Blackmail Rackets Exposed."
 One sixty-two, "Four Essays on Sex."
 One sixty-three, "A Night in White Chapel."
 One sixty-four, "Postcards."
 One sixty-five, "The Psychology of Sex Life."
 One sixty-six, "Sex Impotence, its Causes and Treatment."
 One sixty-seven, "Freud on Sleep and Sexual Dreams."
 One sixty-eight, "The Determination of Sex."
 [fol. 37] One sixty-nine, "What Every Married Man Should Know."
 One seventy, "Growing into Womanhood."
 One seventy-one, "What Great French Women Learned About Love."
 One seventy-two, "The Girdle of Aphrodite."
 One seventy-three, "The Girl with Three Husbands."
 One seventy-four, "The Encyclopedia of Sex."
 One seventy-five, "What Every Young Woman Should Know."
 One seventy-six, "Sex and Psychoanalysis."
 One seventy-seven, "The Dawn of Rational Sex Ethics."
 One seventy-eight, "Prostitution in the United States."

- One seventy-nine, "How to Choose a Mate Scientifically."
 One eighty, "Artificial Insemination."
 One eighty-one, "Twenty-six Men and a Girl."
 One eighty-two, "The Dance of the Death."
 One eighty-three, "A Nasty Story."
 One eighty-four, "Syphilis, A Treatise for the American Public."
 One eighty-five, "Common Sense of Sex."
 One eighty-six, "Follies of Lovers."
 One eighty-seven, "Dixie Sparkle."
 One eighty-eight, "Queen of Hearts."
 One eighty-nine, "Exotique, No. 16."
 One ninety, "Strip Tease Stories."
 One ninety-one, "The Bizarre, No. 20."
 [fol. 38] One ninety-two, "Meet the Girls, Volume I, Issue 7."
 One ninety-three, "Brandee Kayse."
 One ninety-four, "Nudist Yearbook, No. 5."
 One ninety-five, "Photograph Handbook, No. 327."
 One ninety-six, "Laurie." L-a-u-r-i-e.
 Number one-ninety-seven, "Exotique Photo Album, No. 4."
 One ninety-eight, "Bizarre Party."
 One ninety-nine, "Unusual Models, No. 3."
 Two hundred, "Cynthia."
 Two-0-one, "B-u-x-i-e—No. 6."
 Carol Haze, Number 202.
 Number 203, "Strange Lust."
 Two-0-four, "Extatique," E-x-t-a-t-i-q-u-e.
 Two hundred and five, "Sweet Sue."
 Two hundred six, "Pinups of Jane Mansfield, 1957 Issue."
 Two hundred seven is "Continental, Issue No. 2."
 Two hundred and eight, "Art Studies, No. 1."
 Two hundred nine, "How to take Glamour Photos, No. 285."
 Two hundred ten, "Photo Studies, No. 350."
 Two hundred eleven, "Cynthia."
 Two hundred twelve, "Extatique," 212.
 Two hundred thirteen, "Extatique, No. 2."
 Exhibit 213 is Number 2.
 Two hundred fourteen, "Extatique Photo Album, No. 3."

Two hundred fifteen, "Salon Photography, 306."
[fol. 39]. Two hundred sixteen, "Jem, December."

Two hundred seventeen, "Peter Basch's Glamour Photography, No. 313."

Two hundred eighteen, "Modern Man Quarterly, Fall Edition."

Two hundred nineteen, "Sit, Annual, Winter, 1957."

Two hundred twenty, "Mafe, November Issue."

Two hundred twenty-one, "Man's World, December."

Two hundred twenty-two, "Playboy, Playmate Calendar, 1958 Edition."

Two hundred twenty-three, "Escapade, December."

Two hundred twenty-four, photographs.

Two hundred twenty-five, "Exotique, No. 13."

Two hundred twenty-six, "Photographing the Female Figure, No. 348."

Two hundred twenty-seven, "Prizewinning Photography, 340."

Two hundred twenty-eight, "Figure Photography, No. 250, Peter Gowland's."

Two hundred twenty-nine, "Trained in Leather."

Two hundred thirty, "Exotique, No. 12."

Two hundred thirty-one is "Creative Photography."

Two hundred thirty-two, "Adrian Presents Nauncy Pierre."

Two hundred thirty-three, "Good Photography, 346."

Two hundred thirty-four, "Adam," that is No. 11.

[fol. 40] Two hundred thirty-five, "She, November."

Two hundred thirty-six, "Exotique, No. 7."

Two hundred thirty-seven, "Exotique, No. 10."

Two hundred thirty-eight, "Adrian Presents Nauncy Pierre."

Two hundred thirty-nine, "Frenchie."

Two hundred forty, "Art Deluxe, Series No. 2, Presenting Rosemary Clark, Series No. 2."

Two hundred forty-one, "Figure Quarterly, Volume 13."

Two hundred forty-two, "Pepper, December Issue."

Two hundred forty-three, "Modern Glamour Girls, Series No. 1."

Two hundred forty-four, "Sunbathing, Review for Fall of '57."

- Two hundred forty-five, "Revealed, December."
 Two hundred forty-six, "Peep Show, November."
 Two hundred forty-seven, "Camera in Paris, No. 343."
 Two hundred forty-eight, "Pack O' Fun, December."
 Two hundred forty-nine, "Glamour Parade, December."
 Two hundred fifty, "Figurette, No. 4."
 Two hundred fifty-one, "Breezy, December."
 Two hundred fifty-two, "The Mountain Boys, No. 1441."
 Two hundred fifty-three, "Quick, October."
 Two hundred fifty-four, "R-o-g-u-e," Rogue. October.
 Two hundred fifty-five, "Figure Quarterly."
 [fol. 41] Two hundred fifty-six, "People Today, November."
 Two hundred fifty-seven—these are books—two hundred fifty-seven, "Are you over Sixty?"
 Two hundred fifty-eight, "What you Should Know about Sexual Impotency."
 Two hundred fifty-nine, "Variations in Sexual Behavior."
 Two hundred sixty, "Sex Life in Marriage."
 Two hundred sixty-one, "Adam and Eve."
 Two hundred sixty-two, "Sex Control."
 Two hundred sixty-three, "Sexual Symbolism."
 Two hundred sixty-four, "How to Achieve Sex Happiness in Marriage."
 Two hundred sixty-five, "The Homosexuals."
 Two hundred sixty-six, "Psychotathia Sexualis."
 Two hundred sixty-seven, "The Sex Technique in Marriage."
 Two hundred sixty-eight, "Female Homosexuality."
 Two hundred sixty-nine, "Abnormal Sexual Behavior."
 Two hundred seventy, "The Sexually Adequate Female."
 Two hundred seventy-one, "The Sexpert's Travel Guide."
 S-e-x-p-e-r-t-s.
 Two hundred seventy-two, "Homosexuality, Donald Webster Cory."
 Two hundred seventy-three, "Sexual Deviations, by Louis London, M.D."
 Two hundred seventy-four, "Sex Practice in Later Years." Dr. Podolski.
 [fol. 42] Two hundred seventy-five, "Mating Manuals."

Two hundred seventy-six, "Marriage, Sex and Family Problems." No. 21.

Two hundred seventy-seven, pocket cards. Comic cards.

[fol. 43] The Court: The first thing, I think you ought to give the appearances to the court reporter. She says she hasn't them all.

APPEARANCES

Mr. Granoff: Let the record show that Mr. Earl Schrader, first assistant prosecuting attorney, and Loeb H. Granoff, assistant prosecuting attorney, appear in this matter on behalf of the State.

Mr. Shenker: Morris A. Shenker, Sidney M. Glazer and Bernard J. Mellman, of St. Louis, for all of the parties involved, and Mr. Louis Wagner for the Ruback & Town Book Stores.

Mr. Brown: Lawrence Brown. I represent H. M. H. Publishing Company, Inc.

Mr. Shenker: At this time, if it please the court, I would like to ask leave to file motions of the Kansas City News Distributors and Homer Smay, who is identified as the manager of that business, to quash the search warrant and for the return of property seized, as well as a supplemental motion of the same company, and I should like to ask leave to file similar motions at this time in behalf of 123 East Twelfth Street and 5 West Twelfth Street, all in Kansas City, Missouri, with leave to file the same types of motions for all of the other parties involved. We did not get the mechanics of preparing all of them, did not have all of the information. They will be of the same [fol. 44] nature. We will ask at this time that—at the conclusion we may have some minor amendment, so far as these motions are concerned, and will ask leave of court now that when we file the other motions, which will be done in a day or two, that we should have leave to amend to conform to whatever we think is appropriate.

The Court: Well, at this time the court will reserve its ruling on those motions.

MOTION OF H. M. H. PUBLISHING COMPANY, INC. FOR A
SEPARATE TRIAL AND OVERRULING THEREOF

Mr. Brown: If the court please, on behalf of the H. M. H. Publishing Company, Inc., publishers of the magazine, "Playboy," I move for a separate trial, for a severance from this dragnet of their magazines. Of course, we can't control where the magazine is sold, and we think there is an element of perhaps—perhaps an element of guilt about association, and we feel that in the interests of justice we should be granted a separate hearing.

Mr. Granoff: May it please the court, the State would object to this motion on the ground, first of all, that severance is entirely within the discretion of the court, all of this material is before the court, and will be before the court for its determination, and I don't think that severance would in any way aid the court in determining the issues of the case as regards the publication which Mr. Brown is referring to.

The Court: All right. Motion will be overruled.
[fol. 45] Mr. Shenker: In order to expedite the handling of this matter, if the court please, representing all of the parties, it is agreeable to us that they may be tried jointly, with the understanding that if any particular matter comes up insofar as it relates to a particular individual or a particular location, that it will so be treated. It will greatly expedite the handling of the matter insofar as the court is concerned, and the State.

The Court: That is agreeable.

OPENING STATEMENT ON BEHALF OF STATE

Mr. Granoff: May it please the court: The State feels that any statement to be made to the court at this time should be of the very briefest nature, particularly in view of the fact that the State has supplied the court with a trial brief as to the facts and the law in this case, and copies of that trial brief have been supplied to counsel for all of the interests appearing in this case.

Very briefly, this is a hearing called at the court's own direction, pursuant to Section 542.400 of the Missouri stat-

utes. The evidence will show that on October 10 of this year, a Jackson County law enforcement agency confiscated large quantities of books, magazines, and other publications from six locations here in Kansas City, Missouri. Now, it is the position of the State that these publications are obscene, and I might say to the court at this time that the only issue before Your Honor will be whether or not [fol. 46] the publications are in fact and in law obscene.

Now, I think that it would be proper at this time for the State to make this further remark: The Prosecutor's office would be the very last to suggest, Your Honor, that any individual or group of individuals should be set up, so to speak, as an arbitrary board of censorship. Now, it is our feeling in the matter that we live in an era of intellectual emancipation, where every individual, Your Honor, should be able to judge for himself the literary merit, if any, of any particular publication, but it is our position in this case that out and out filth and smut and dirt are not within the realm whatsoever of free speech or free press, and we feel that the evidence will show that a substantial quantity, if not all, of the material which will be introduced into evidence, is designed for the very purpose of appealing to the sensual appetite. We feel that after the court has an opportunity to examine the exhibits which will be introduced into evidence, to observe their obvious purpose and effect upon this community, that an appropriate order will be issued by the court, preventing the further circulation of this kind of moral garbage from the public newsstands.

Thank you.

OPENING STATEMENT ON BEHALF OF DEFENDANTS

Mr. Shenker: May it please the court, the position of the parties involved here may be briefly summarized, and I [fol. 47] am not going to undertake to give all the reasons that we have at this time, but briefly may be summarized as follows: That this proceeding is improper; that the statute, by virtue of which apparently the State has proceeded, in fact, is unconstitutional; that it is vague, indefinite and uncertain; that the methods applied were arbi-

trary; and that the seizure of so vast an amount of material on the mere idea or opinion of some one or more police officers in determining that the matter is of the nature that should not be circulated in the City of Kansas City, Missouri, that that was improper; that it amounts to a censorship; that the action was totally violative of the substantive rights and of the violation of the constitutional rights of the State, as well as the Constitution of the United States, and furthermore, that the articles which are—which were seized and which are the object of this inquiry by the court now, that they are not obscene, that they are all within the arm and within the established means of communication of ideas and photographs, and that it is purely an arbitrary exercise of power by the State in having seized these materials, and of course we are asking for the return of the articles.

I might add, Your Honor, if I may, that when I said we are asking for the return of the articles, I mean that we are asking for their immediate return, because, as the court will see, many—most of them are current issues, and [fol. 48] the news value, of course, disappears after some period of time after the publication, and of course, they become entirely and completely worthless unless they are available for distribution at the immediate time, and for that reason, when we ask for return, we are asking for the immediate return so that they can be—so that it will not be a total loss to the publishers as well as to the various news venders or to the distributors.

STATE'S EVIDENCE

LT. CHARLES COUGHLIN, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Lt. Coughlin, for the record, state your full name?

A. Charles Coughlin.

Q. Where do you live?

A. 8401 Douglas, Kansas City, Missouri.

Q. What is your occupation?

A. Police officer, with the Kansas City, Missouri, Police Department.

Q. Are you assigned to any particular branch?

A. Yes, sir; vice squad.

Q. How long have you been with the Kansas City Police Department?

A. Nine and a half years.

Q. How long, Officer, with the vice squad?

[fol. 49] A. Six years.

(State's Exhibits A, B, C, D, E, and F, marked for identification.)

By Mr. Granoff:

Q. Lt. Coughlin, I hand you six documents which are marked State's Exhibits A through F. Please examine them, and tell the court what these documents are, if you know, sir.

A. These are copies of the complaints that I signed in front of Judge Terte, the 10th of October, against the locations listed—do you want me to read the locations off?

The Court: They speak for themselves.

A. Those are the complaints that I signed on October 10.

By Mr. Granoff:

Q. These are the complaints pursuant to which the six search warrants were issued, and on which this proceeding today is based, is that right?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Granoff: At this time, Your Honor, the State would like to introduce into evidence State's Exhibits A through F inclusive.

Mr. Shenker: We are objecting to the introduction of any and all evidence on the ground that this proceeding is contrary to law and that the proceeding was in violation of

the rights of individuals involved, and we are asking for the return of the property without any necessity for a hearing.

The Court: All right.

[fol. 50] Be overruled; the objection is overruled.

Mr. Brown: We understood that the objections made by Mr. Shenker will also go to the client that I represent.

The Court: Same ruling.

(State's Exhibits A, B, C, D, E, and F, being so offered, were received in evidence.)

By Mr. Granoff:

Q. Lieutenant, please tell the court how you came to make these complaints?

A. I had conducted an investigation to complaints I had received in regard to obscene literature on newsstands—

Mr. Shenker: I am going to object to anything that was said. If he conducted an investigation, it is one thing. We object to him saying what the complaints are; that is hearsay.

The Court: Sustained.

By Mr. Granoff:

Q. You say, Officer, that you conducted an investigation, is that right?

A. Yes, sir.

Q. Please tell the court the nature of that investigation?

A. Well, the investigation started some months back by routine checks of these particular newsstands, and at which time, upon entering, we would observe these particular magazines on display at the newsstands. On October 9, the day before I signed the complaint, I went to the five newsstands involved, I observed on display at these news-
[fol. 51] stands magazines that we had observed there before. I looked at a few of these magazines, and I purchased one magazine at each newsstand. They had pictures of nude women in them; they had articles in these magazines that we felt were—

Mr. Shenker: I will object to that, as to what he felt.

The Court: That is a matter that the court will have to decide.

By Mr. Grapoff:

Q. Just tell us what you did?

A. In regards to five newsstands, in regard to the distributor, 3105 Euclid, Kansas City News Distributors, on the 8th of October, two days before the complaints were signed, I went to that location and had an interview with Mr. Homer Smay—S-m-a-y—the manager, and at that time I had a list of the magazines—partial list of the magazines that we were investigating, and he admitted they were a distributor of all but one. He wasn't sure about one of these. This is in the course of a conversation that took place at that location. From that, we got the—I signed the complaints from that information I had there.

Q. Were these various magazines you have testified to among the material which was confiscated on the 10th of October, pursuant to these warrants?

A. Yes.

Mr. Granoff: I see. No further questions.

[fol. 52] Cross examination.

By Mr. Shenker:

Q. Now, Lieutenant, I have a few questions, if you please, that I would like to ask you.

A. Yes, sir.

Q. I believe you testified that prior to the time that you executed the affidavits that are identified as Exhibits A to E inclusive, that you had gone to these newsstands, is that correct, in question?

A. Yes, sir.

Q. And that you purchased some magazines?

A. Yes, sir.

Q. Now, those magazines that you purchased, do you have the names of those magazines now, do you know what they are?

A: Yes, sir; I have.

Q. What were they?

A. Well, I have the magazines right here.

Q. You have the magazines there. May I look at them, please?

A. Yes.

Q. Now, Lieutenant, you have shown me five magazines, three entitled "Adam," and then another one—the three entitled "Adam," has an inscription on the page "the most talked-about magazine in the United States," and another one entitled "Adam," and it says, "enticing, exciting enjoyment," and then another magazine, "Modern Man, Quarterly." Those are the five magazines which you purchased, is that correct, sir?

A. That is correct.

[fol. 53] Q. The first three are identical, is that correct?

A. Right.

Q. And then the other two are different?

A. Yes, sir.

Mr. Granoff: Pardon me for a moment. If you would like, the State would be more than willing to stipulate these magazines into evidence, if you think it is admissible.

Mr. Shenker: I just want to ask the Lieutenant a few more questions.

By Mr. Shenker:

Q. After you purchased those magazines you say that you also had a conversation, you went to the Kansas City Distributing Company, and had a conversation with Mr. Homer Smay, is that correct?

A. That took place the day before I bought the magazines.

Q. That was the day before you bought the magazines?

A. The 8th of October.

Q. Then you went to apply for this search warrant, is that correct?

A. Yes, sir.

Q. Now, in applying for the search warrant, did you, sir,

display any of the magazines to the Judge when you asked for the search warrant?

A. No, sir; I did not.

Q. In other words, you didn't display any of the magazines that you purchased in any of the newsstands to Judge Terte, is that correct?

A. That is correct.

[fol. 54] Q. In the preparation of the affidavits—if you would care to look at them—you did not mention any particular magazine, is that correct, any particular magazine, you just described—you just mentioned generally, using the word magazine, is that correct?

A. Well, we mentioned—we described the articles as “obscene, lewd, indecent”—is that what you are referring to?—didn't mention any magazine.

Q. Didn't mention any magazine by name or any other publication by name, is that correct, sir?

A. That is right.

Q. At the time that you purchased these magazines I will ask you, sir, if you had occasion to observe that in these establishments there were thousands and thousands of different copies of magazines, of different magazines than those which you purchased?

A. Yes, sir.

Q. Would you say it would be a fair statement that in the newsstands apart from the Kansas City News Distributing Company, that they would have approximately 25 to 30 thousand individual copies?

A. Are you referring to all magazines, or just magazines of the type we seized?

Q. No; all magazines, their entire stock.

A. I would imagine in that vicinity.

Q. You would say that would be a fair statement?

[fol. 55] A. Yes.

Q. Of course, the Kansas City News Distributing Company, they have hundreds of thousands of magazines, isn't that correct?

A. Yes, sir.

Q. That is a storage house and a distributing center?

A. Yes, sir.

Q. One or two other questions, if you please. When you went in and made out the affidavit for the search warrant, none of the parties from whom these matters were taken were present or advised ahead of time that there would be such a complaint made by you; is that correct?

A. No, sir.

Q. In other words, the only ones that were present were yourself and Judge Terte, is that correct?

The Court: And the prosecutor.

By Mr. Shenker:

Q. And the assistant prosecutor?

A. Yes, sir.

Q. Those were the only parties present, is that correct?

A. Yes, sir.

Q. And there was no notice of any kind given to either of the parties that an attempt would be made to go in and take a large portion of their stock in trade, is that correct?

A. No written notice, you mean?

Q. Well, any kind of a notice?

A. Well, in the conversation I had with Mr. Smay two [fol. 56] days prior to this seizure, we—I asked him what his opinion would be in regards to us coming out there on this matter, and he said if it was a violation of the State law, he would cease to distribute this material, but if it was a City ordinance, he felt they were unconstitutional, and he would fight it. I was trying to feel out what his position was, if I had to come out and arrest him, or what the situation would be; that is the only notice—

Q. You did not tell him or anyone else that you were going to apply for a search warrant to come and confiscate certain portions of their stock? Is that correct?

A. No, sir.

Q. All you are relating is a conversation you had with Mr. Smay as to what his position would be?

A. That is correct.

Q. He told you that if he was violating the State law, he didn't want to violate it? Is that correct?

A. That is right; yes, sir.

Q. Now, in this—there was no court reporter, of course, present at the time the search warrant was issued on your complaint?

A. Well, there was a clerk of the court, I believe.

Q. Well, was there someone taking down—writing down the conversation that you had or what took place at that time?

A. No, sir; I believe there was not.

[fol. 57] Q. I see. In other words, it is fair to say that the only ones present were yourself, the assistant prosecutor, and the judge, is that correct? No evidence was offered at the time, the only thing that you presented was your affidavit?

A. That is right.

Q. On the basis of that affidavit, you procured the search warrant?

A. That is right.

Mr. Shenker: I believe that is all.

Mr. Granoff: Thank you, Lieutenant. That is all.

(Witness excused.)

Mr. Granoff: May it please the court, on the strength of the complaints which this witness signed before Your Honor, certain notices of hearing were signed by the court, and attached to these notices was an inventory of the material taken from each location. I wonder if counsel would be in a position at this time to stipulate that these are copies of the notices issued by the court and duly posted, in accordance with law, on each of the premises, and that the inventories attached to each of these notices are full and complete and accurate inventories of all material taken from each of the locations.

Mr. Shenker: There are certain portions of this statement that I will be glad to stipulate, but I will not stipulate that everything was done according to law, because we contend it was done contrary to law.

[fol. 58] Mr. Granoff: I understand that this objection goes to the whole proceeding.

Mr. Shenker: That is correct, sir.

I will say that probably before this is done, Your Honor, that we will stipulate certainly that the inventories that were furnished by the police officers are the material that was taken, and we are not claiming that more was taken than is represented on the inventory, and we are assuming that they did not say they took something that they didn't take. We would like to hear from at least one person that went into the place and took the material.

Mr. Granoff: Fine.

Mr. Shenker: If you will put one on. It will not be necessary to put them all on, because I understand there were a number used.

STIPULATION OF COUNSEL RE OFFERS OF STATE'S EXHIBITS IN EVIDENCE

Mr. Granoff: Mr. Shenker, is it all right with you and the other gentlemen here at the table if we stipulate into evidence these six notices of hearing with the attached inventories?

Mr. Shenker: The record may show that the six notices of hearing were issued to the six individual locations that were involved, and that in each notice—to each notice was attached an inventory list representing the articles that were taken from those individual locations.

Mr. Granoff: And that the inventories are accurate?

[fol. 59] Mr. Shenker: That is correct.

(State's Exhibits G, H, I, J, K, and L, marked for identification.)

Mr. Granoff: Pursuant to stipulation with counsel, the State would like to introduce into evidence State's Exhibits G, H, I, J, K, and L, being the notice of hearing, and the attached inventories from each of the six locations.

The Court: Very well.

(State's Exhibits G, H, I, J, K, L, being so offered, were received in evidence.)

LT. BILLY C. MORTON, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Lt. Morton, for the record please state your full name?

A. Lt. Billy C. Morton.

Q. Where do you live?

A. 708 North Pearl, Independence.

Q. What is your occupation, Lieutenant?

A. Police officer.

Q. With what branch?

A. Jackson County Sheriff's Patrol.

Q. How long have you been with the Sheriff's Patrol?

A. Three years.

Q. Were you so engaged on October 10 this year?

[fol. 60] A. Yes, sir.

Mr. Granoff: Mark this State's Exhibit M.

(State's Exhibit M, marked for identification.)

By Mr. Granoff:

Q. Now, Lt. Morton, I hand you what has been marked as State's Exhibit M, and ask you to please examine it carefully and tell the court, if you know, what that is?

A. That is a carbon copy of the search warrant that I served on Ruback Newsstand on Twelfth Street.

Q. I beg your pardon, sir, isn't that the original? Look at it again. I mean, it is the original return made to this court, is that right?

A. That is the original return, yes, sir, I made to this court.

Q. All right. Tell the court, Officer, how you came to execute that warrant?

A. I was called to the Kansas City Police Headquarters to accompany two Kansas City police officers to this location to serve a search warrant.

Q. Is that your answer, sir?

A. Yes, sir.

Q. And the warrant was executed, is that correct?

A. Yes, sir.

Q. And property confiscated pursuant to it?

A. Yes, sir.

Q. This is referring to the—referring to the rear side of it, is this your signature on the return?

A. It is.

[fol. 61] Mr. Granoff: All right. Thank you.

Would you like to see this (indicating)?

Mr. Shenker: Yes. O. K.

OFFER IN EVIDENCE

Mr. Granoff: At this time, Your Honor, the State would like to introduce State's Exhibit/M into evidence.

The Court: Very well.

Mr. Shenker: I suppose the record may show that that is the search warrant that was issued pursuant to—the statement or the complaint for a search warrant that was made by Officer Charles—Lt. Charles J. Coughlin, is that correct?

Mr. Granoff: That is correct.

Mr. Shenker: In order that we don't have to continue to object, I am not objecting to this particular—my objection is a general objection, going to all the inspections. I presume if it can be shown it is preserved, it won't be necessary—

The Court: That will be the understanding.

Mr. Granoff: Thank you, Officer.

(State's Exhibit M, being so offered, was received in evidence.)

Cross examination.

By Mr. Shenker:

Q. If I understand correctly, you were called upon by some members of the Police Department of Kansas City to accompany them to 5 West Twelfth Street, Kansas City, Missouri, to execute this search warrant?

A. That is correct.

[fol. 62] Q. That is State's Exhibit M?

A. Yes, sir.

Q. Now, how many persons accompanied you to that location?

A. Myself and two other police officers.

Q. You and two other officers?

A. Yes.

Q. About what time of the day did you get there?

A. 11:15.

Q. 11:15 a.m.?

A. Yes, sir.

Q. How long did you stay there?

A. I would say somewhere around 12:45.

Q. Were you there during the entire time—and I believe that the receipt for the merchandise that was taken bears your name, so you were there during the entire period?

A. That is right.

Q. Until—from the time the officers got there were you there until you took the merchandise with you away from there, is that correct?

A. That is correct.

Q. You would say approximately an hour and a half or two hours?

A. Yes, sir; something like that.

Q. Now, will you describe those premises, if you please, for the court?

A. It is a building about 20 by 20. It is located on Twelfth, with magazines displayed out in front and magazines displayed inside on the shelves. Customers in the place were buying magazines at the time that we entered.

Q. In other words, it is a place full of magazines, plus [fol. 63] other commodities, is that correct, such as candy, cigars—

A. That is correct.

Q. The articles that are ordinarily sold in a place where they sell magazines?

A. Yes, sir.

Q. It is in a corner—

A. That is correct.

Q. Now, just tell—did you yourself pick out any magazines that are attached on the list to some—I notice a list

which is attached to the return—I show you State's Exhibit "G," which appears to bear your signature—

A. Yes, sir.

Q. — Lt. Morton?

A. Yes.

Q. It has considerable writing on this, and particularly—now, in that list, did you participate yourself in selecting some of those articles that are on this list, State's Exhibit "G"?

A. I did.

Q. You did?

A. Yes, sir.

Q. And who else selected the articles?

A. The other two police officers with me; I don't recall their names.

Q. In other words, all three of you worked in selecting articles, is that correct?

A. That is right.

Q. You took what you wanted to take, and each of the other officers took what they wanted to take, is that correct?

A. I was in charge of the team there.

[fol. 64] Q. I see.

A. And everything that they confiscated they brought to me, and asked for an o.k. on it, or to leave it. I either o.k.'d it or rejected it.

Q. In other words—I am sorry, I didn't know that was the procedure followed. See if I got this right: You were in charge of the two officers that came there with you, is that correct?

A. That is right.

Q. They went about the store, is that right—

A. That is correct.

Q. —as well as you did, picking out certain magazines and publications, is that right?

A. Yes, sir.

Q. Then when they picked them out, you made the decision whether they should be taken or whether they should be left, is that correct?

A. In the presence of the manager.

Q. We are not accusing you of taking anything that isn't on the inventory. That has been stipulated, there is no

question on that at all. The only thing is that the decision—the manager had no right in determining what you should take or shouldn't?

A. That is correct.

Q. The decision was made by you?

A. That is correct.

Q. When the officer would bring over the publication, you would examine it and either—agree with the officer that it should be taken, and if it was taken, it was included on [fol. 65] Exhibit G; if it wasn't taken, it was put back on the shelf?

A. Correct.

Q. Of course you always did that yourself, I mean, you always selected articles?

A. Right, sir.

Q. And would you say that a fair statement would be that approximately there were 25 thousand magazines over at the place, at that location?

A. You mean the overall?

Q. All the magazines?

A. I imagine.

Q. Probably more than that?

A. Yes.

Q. It is a pretty big place, and they have many, many thousands and thousands of magazines, is that correct?

A. That is right.

Q. And when you took—when you decided that a magazine or a publication should be taken, you took all of that issue that was there, is that correct?

A. Yes, sir.

Q. And I notice that there is considerable handwriting on there, is that also—on the bottom part under "miscellaneous"—is that also your handwriting?

A. It is, sir.

Q. I see. In any of those instances you—in other words, the numbers that indicate there, that is the number of copies, like it says "90," that would be 90 copies, is that right?

A. That is right.

Q. And "50," that means 50 packages, and so forth?
[fol. 66] A. That is right.

Q. What did you do with those magazines when you took them, you brought them to the Prosecuting Attorney's office?

A. I brought them to the County Jail; yes, sir.

Q. Excuse me. County Jail, for safety?

A. Right.

Mr. Shenker: I believe that is all.

Mr. Granoff: Thank you, Officer.

(Witness excused.)

Mr. Shenker: We will be perfectly willing to stipulate, if the court please, that the same procedure—if that is a fact, that the same procedure was followed in the other locations that are involved in here, excepting that in some locations there were as many as 8 or 9 men involved—as I said, we would be willing to stipulate to the same procedure involved in all the other locations that are the subject of the inquiry here, and that if the State offered witnesses they would testify substantially in the same manner, excepting I do think there were some differentiations on distributors at 3105 Euclid. I asked the State to produce that witness, Your Honor.

[fol. 67] ALBERT ANGOTTI, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Officer, for the record, please state your full name?

A. Albert Angotti.

Q. Where do you live?

A. 2016 Denver, Kansas City.

Q. And although your occupation is obvious, for the sake of the record, please state it?

A. Jackson County Sheriff's Patrol.

Q. How long have you been with them?

A. About four years.

Q. Were you so engaged on October 10 of this year, Officer?

A. Yes, sir.

(State's Exhibit N, marked for identification.)

By Mr. Granoff:

Q. I hand you what has been marked as State's Exhibit N for identification. Please examine this document, Officer, and tell the court, if you know, what it is.

A. It is a search warrant authorizing the search of a property.

Q. Did you execute that warrant?

A. I did, sir.

Q. Please turn it on its reverse side, and observe the return on that warrant. Is that your signature on the return?

A. It is.

[fol. 68]

OFFER IN EVIDENCE

Mr. Granoff: At this time the State wishes to introduce State's Exhibit N into evidence.

The Court: All right.

(State's Exhibit N, being so offered, was received in evidence.)

By Mr. Granoff:

Q. Now, Officer Angotti, can you tell us what time of the day was it on October 10 that this warrant was executed?

A. It was 11:15 a.m.

Q. And were you accompanied by any other law enforcement officers?

A. I was, sir; Major Dennison, of the Kansas City Police Department, and Lt. Coughlin.

Q. Also of the Kansas City Police Department?

A. Yes, sir.

Q. Please, for the benefit of the court, describe the premises, generally, that you searched?

A. Well, it was what is called the Kansas City News. It is a warehouse at Thirty-first and Euclid. It is a warehouse where they distribute magazines for all the distributors in Greater Kansas City.

Q. Did you observe large quantities of magazines and the like on the premises?

A. Yes; the warehouse, I would say, was pretty well full of magazines.

Q. I take it you executed this warrant by confiscating [fol. 69] large quantities of that material?

A. That is right.

Mr. Granoff: I have no further questions.

Cross examination.

By Mr. Shenker:

Q. I believe you testified that you went there with Lt. Coughlin and Major Dennison?

A. That is right.

Q. Did anyone else go there, besides the three of you?

A. There was another Kansas City officer with us, but I can't recall his name.

Q. Without giving the name, how many were there all together of you?

A. Four of us.

Q. Four of you?

A. Yes, sir.

Q. You went there approximately at 11:15 a.m. on the date in question, the 10th day of October, is that correct?

A. Yes, sir.

Q. About how long did you stay there?

A. I believe we left there approximately 2:15.

Q. I see.

A. As near as I can remember.

Q. Stayed approximately three hours or so?

A. Yes, sir.

Q. During that period, what did you do there?

A. Well, we had a list of what magazines that we were supposed to pick up, and anything else that we thought— [fol. 70] wasn't on the list that we—

Q. That you wanted to pick up, in your judgment?

A. In our judgment.

Q. Now, in arriving, then, at this—as to what to pick up,

did you go through all the entire premises there, or as much of it as you could see?

A. Well, as much as we could see.

Q. I see. Was there—it is a rather large building, isn't that correct?

A. Yes, sir; it is a fairly large building.

Q. Does it have more than one floor, do you recall?

A. No; just the one floor is all we looked at.

Q. There are large stacks of magazines, many of them bundled up, and they run into hundreds of thousands of copies, isn't that right?

A. Oh, yes.

Q. Probably closer to a million copies, is that right?

A. That might be true.

Q. And now when you saw a magazine that you thought you should pick up, what did you do, just turn it over and put it on the bundle on the side—take the bundle and include that on your receipt, is that correct?

A. Yes, sir.

Q. Did the other officers that were with you do the same?

A. That is right.

[fol. 71] Q. In other words, what it is, each officer—did you divide up the sections of the building into different areas, is that the idea—

A. Yes.

Q. —to some extent?

A. Yes, sir.

Q. When you looked at a bundle, you looked at a magazine, and thought it ought to be picked up, you would just take this bundle or any number of bundles of the same magazine and put it aside and put it on the receipt?

A. Yes.

Q. The same procedure was followed by the other officers that were there?

A. Yes, sir.

Q. When it was all assembled, a receipt was given to Mr. Homer Smay, is that correct?

A. Yes, sir.

Q. He is the one that is in charge of the premises, you met him there?

A. That is right.

Q. It was then hauled away in a truck, I presume?

A. It was hauled away in a truck and put on the 15th floor of the courthouse.

Q. Of the courthouse here?

A. Yes, sir.

Mr. Shenker: That is all.

(Witness excused.)

Mr. Granoff: May it please the court, it is the intention of the State to call four other officers of the local law enforcement agencies, who would testify as to the respective [fol. 72] tive location which they went to as to the execution of the other four search warrants in this case. I should like to ask counsel at this time whether they would be in a position to stipulate that these officers would testify to substantially the same things and identify these exhibits in the same way the two previous officers have done, but as to the remaining four locations involved in this case.

Mr. Shenker: I thought I had already stipulated to that, but if I haven't, I will.

OFFERS-IN EVIDENCE

Mr. Granoff: In that case, I would like to have these four search warrants marked as exhibits in the case, and should like at this time to introduce them into evidence.

(State's Exhibits O, P, Q, and R, marked for identification.)

(State's Exhibits O, P, Q, and R, being so offered, were received in evidence.)

Mr. Granoff: Your Honor, if the record is not already clear on this point, I should like it to be understood, if counsel are in a position to so stipulate, that all of the material reflected on the inventories attached to the notices of hearing in this case already introduced into evidence reflect all of the material confiscated by the law enforcement agencies, pursuant to the six search warrants which have just been introduced into evidence.

Mr. Shenker: That is correct. All of the material that is reflected in those exhibits represents material that was [fol. 73] confiscated—that is, represents part of the material, but is representative of the material that was confiscated on the 10th day of October, on the various locations, not all of the exhibits, however, were confiscated from any one location, that is a total—

STIPULATIONS OF COUNSEL RE OFFER OF STATE'S EXHIBITS
IN EVIDENCE

Mr. Granoff: I am talking about the inventories.

Your Honor, the State would also like to ask counsel if they would be prepared to stipulate as to this fact: Here are four boxes of various publications which have heretofore been marked for identification as State's Exhibits 1 through 277. Will counsel be prepared to stipulate that all of these exhibits may be introduced into evidence in this case and will reflect completely all of the material which was confiscated pursuant to the six search warrants from each of the six locations involved in this case? In other words, are counsel prepared to stipulate that State's Exhibits 1 through 277 fully represent all of the publications and all of the material confiscated by the law enforcement agencies which are brought before this court for the purposes of determination, pursuant to counsel's—

Mr. Shenker: Counsel will stipulate that these exhibits represent a copy of some thirteen to fifteen thousand—how many did they seize altogether, more than fifteen thousand?

Mr. Granoff: I didn't personally count them.

[fol. 74] Mr. Shenker: —thousands and thousands of magazines, I think they will probably run over twenty thousand—of magazines that were confiscated on the date in question. However, I want to call the court's attention that these exhibits, all of these exhibits were not taken from any one location. In other words, there are some that were taken in one location, and others in another location, and that none of the exhibits which are anything but books and periodicals were taken from the Kansas City News Distributing Company, because the Kansas City News Distributing Company does not distribute photographs or any

other kind of material, excepting books and periodicals and magazines, of course.

Mr. Granoff: Well, Mr. Shenker, would this be a correct statement, then, that these exhibits 1 through 277 represent all of the publications which are in issue in this case, represent completely all of the material taken from all of the locations? However, of course, it is understood that, for example, I would like to say, Exhibit 1 may or may not have been in any of the other five locations.

Mr. Shenker: It is like Noah's Ark, it has a copy of everything.

Mr. Granoff: Everything is represented, and since you do represent all interests in this case, with the exception of a few, all of those interests are being protected by the [fol. 75] introduction of those exhibits:

Mr. Shenker: Yes.

Mr. Granoff: Be it so stipulated.

I should like to introduce into evidence State's Exhibits 1 through 277, and make them a part of this record.

(State's Exhibits 1 through 277, inclusive, being so offered, were received in evidence.)

Mr. Granoff: Mr. Shenker, Mr. Brown and Mr. Wagner, I should like to ask you at this time if you are prepared to stipulate that all of State's Exhibits 1 through 277 were intended either for sale, circulation, or other distribution in the Greater Kansas City Area?

Mr. Shenker: I am prepared to say this: That—with the exception of some periodicals which were returned, as they call it in the magazine trade, and were held by the Kansas City News Distributing Company to send back to the publishers—they have the right of return, and that is after a copy becomes old, such as, an example, the October issue was returned in October, because the October issue was on sale in September—with the exception of that—but I will say that they were circulated prior to their return by the dealers, and that at this time they were held to be returned to the publisher, so if it is a question whether they were circulated, the answer is we will stipulate they were, with the exception of those that were being held to be [fol. 76] returned to the publishers because they were out

of date, all of them were held for the purposes of circulation.

Mr. Granoff: May we stipulate as to this, as to those publications which were being held for return, they had originally been intended for sale and circulation.

Mr. Shenker: And they were circulated for sale in this area, that is correct.

Mr. Granoff: Be it so stipulated.

Mr. Wagner, may it be understood that the stipulation which Mr. Shenker and I have entered into will also go to all of the exhibits which are applicable to your client, Ruback's?

Mr. Wagner: It is agreeable.

Mr. Granoff: Mr. Brown, I understand that you represent the publication "Playboy," may it be stipulated between you and myself that "Playboy" was intended for circulation in this community?

Mr. Brown: Yes. That is agreeable.

Mr. Granoff: Thank you, sir.

Noon Recess

[fol. 77] Mr. Granoff: Mr. Atzenweiler, will you take the stand.

ROGER M. ATZENWEILER, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Mr. Atzenweiler, for the record please state your full name?

A. Roger M. A-t-z-e-n-w-e-i-l-e-r.

Q. Where do you live, sir?

A. 9621 Sagamore Road.

Q. What is your occupation?

A. I am a professional photographer.

Q. Can you tell us something about your educational background in this field?

A. Yes. I am a graduate of the Kansas City University; I attended Kansas City Art Institute and School of Design;

graduate of the Naval School of Photography, at Pensacola; under the auspices of the Navy, worked with Metro-Goldwyn-Mayer; worked as a naval aviator and photographer overseas in aerial photography; right now I am president of the Greater Kansas City Photographic Association. I own and operate two studios, one specializing in portraiture, mainly; and do have several illustrative accounts, however, that we do for advertising agencies.

[fol. 78] Q. Do you hold any positions of honor in your profession nationally?

A. I have been appointed—it is awaiting confirmation—as a member of the Board of Directors; I am not yet officially a member of the Board, yet.

Q. Mr. Atzenweiler, are you ever called upon to give your opinion as an expert in the field of photography upon the merits, if any, of the work of other photographers?

A. Yes; I have been a judge in several photography exhibits.

Q. Can you tell the court generally how you go about passing upon the merit, if any, of photographs?

A. Well, a photograph is—

Mr. Shenker: May I submit, Your Honor, at this time that that testimony is certainly incompetent and irrelevant to the points at issue in this case, doesn't tend to prove or disprove any of the allegations. I am differentiating between his testimony, this question, and the qualifications. Now he is going into the question of photography, and certainly it doesn't have any bearing upon the issues in this matter, doesn't tend to prove or disprove anything; purely incompetent.

The Court: Overruled at this time. We will see how far we can get in it.

By Mr. Granoff:

Q. The court said that you may answer, Mr. Atzenweiler. How do you go about judging the merit, if any, of photographs? [fol. 79]

A. A photograph, in my opinion, is taken either to teach something—

Mr. Shenker: I will object to that as not responsive to the question, if the court please.

Mr. Granoff: May it please the court, I think that the witness is trying to explain how he does go about passing upon photographs as an expert.

The Court: Let him answer. I will let him answer at this time.

A. In our opinion, a photograph is designed to sell something, teach something, or create an impression. If it creates an impression, there are many different types. It can create a sensual impression, a base impression, an aesthetic impression, or many different types of impressions. As to what constitutes a good photograph or a bad photograph, you would have to judge it from the reason the photograph was taken. There is—

Mr. Shenker: I will ask that that last part of the statement be stricken, Your Honor, as well as the statement that he made, on the ground that that was not responsive to the question. The question, as I understand it, was how he judges a photograph, not why they were taken.

The Witness: That is part of the question.

Mr. Granoff: I think obviously, Your Honor, that in [fol. 80] passing upon the merit of a photograph you must necessarily take into consideration the purpose for which the photograph was taken. I think that the witness—

The Court: Let me give you my view at this moment.

Mr. Granoff: All right.

The Court: I don't think this witness is any more qualified to pass on whether a picture is obscene than this court.

Now, with that understanding, I will let you examine him, but that is going to be my position in the matter. I think I am as competent as he is to judge whether a picture is obscene or what effect it would have on the general public.

Mr. Granoff: All right, Your Honor.

The Court: That is my view of it. He can testify as to whether it is a good photograph or an amateur photograph, or something of that character, but the ultimate fact, he cannot testify as to what this court is going to have to find. I understand that is the problem of this court.

Mr. Granoff: So that I will not be guilty of going against the wishes of the court, am I given to understand that the witness will be permitted to testify as to the professional purpose for which the photograph is intended?

The Court: No, I don't think so, because I think then that determines the question that this court has finally got to [fol. 81] determine.

Mr. Granoff: Then I shall try to keep within the bounds.

The Court: I know you won't ask questions consciously that would violate the court's order, but I might as well give you my view right now.

Mr. Granoff: Thank you, Your Honor.

By Mr. Granoff:

Q. Before coming to this courtroom, did you have the opportunity, Mr. Atzenweiler, of examining large quantities of photographs, pictorial magazines, and the like, in the office of the Prosecuting Attorney for this county?

A. I did.

Q. I hand you, sir, a quantity of loose photographs marked State's Exhibit 224. Please examine these carefully, and tell the court whether you had an opportunity to examine those photographs.

A. These appear to be the same photographs that I have examined.

Q. With the critical eye of an expert in this field, please characterize these photographs from the point of view as to the type of photography involved, and whether or not from a photographer's point of view they are good or bad photographic examples.

Mr. Shenker: I am going to object to that, if the court please, on the ground it is totally incompetent, irrelevant and immaterial to the point at issue in this case, usurping [fol. 82] the powers of the court; it is broad, calling for conclusion and speculation, doesn't tend to prove or disprove any of the allegations.

The Court: I will overrule it, with the reservation of what I have said about my viewpoint, the propriety of this sort of evidence.

Mr. Granoff: I understand. May I admonish the witness to please keep in mind the ruling of the court.

The Witness: I understand, as best I can. I am not an old hand; I am new at this.

The Court: I don't want you to testify as to what you think may be somebody's impression—

The Witness: I understand. The only thing I can testify is as to the technical professional quality of these photographs.

A. Neither the lighting or the posing, in my opinion, are—constitute quality that would make artistic professional photographs. That is what I would say.

Mr. Shenker: I will ask that the answer be stricken on the ground it is totally incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any allegations—

The Court: I will overrule the objection.

By Mr. Granoff:

Q. Do these photographs have any commercial value?

Mr. Shenker: I will certainly object to that.

[fol. 83] The Court: Yes. That is asking for a conclusion, in the first place.

Mr. Granoff: Well, the witness is an expert in the field.

By Mr. Granoff:

Q. If I didn't make the question clear, do these have any commercial value, from the point of view of photography work, that is, for any commercial value, either in the form of reproduction or sale, that is, from a photographer's point of view? Do you understand my question, Mr. Atzenweiler?

A. Would you repeat that? It is a little vague.

Q. Let me put it this way: As a photographer, can you tell me whether this has any commercial value in the hands of a photographer, could a photographer use these for any commercial value?

Mr. Shenker: I am going to object to it on the ground it is totally incompetent, irrelevant and immaterial to the point at issue.

The Court: Let him answer. I can't see the materiality, but I will permit him to answer, and see what the answer is.

A. The only thing that I could say in that regard would be, to me commercial value means monetary. I would assume money, which means, could you sell these photographs, do they sell anything, and I would say no.

[fol. 84] Q. All right, sir. I now hand you what has been marked State's Exhibit 121. Please examine it and tell the court whether you have had an opportunity previous to today to look at that magazine?

A. I have seen this magazine, I don't know whether it is this identical magazine, but I have seen the magazine "Adam" before.

Q. Have you examined the photographs in this magazine, sir? Please do if you haven't.

A. Yes; I recall these photographs; I did see this magazine.

Mr. Granoff: Let the record please show that the witness is referring to pages 7, 8, and 9 of Exhibit 121, which is, I believe, the November issue of the magazine, "Adam", Volume One, Number Ten.

By Mr. Granoff:

Q. Now, examining those pages, in your opinion as a photographer, is that good or bad photography?

Mr. Shenker: Well, I am going to object again, if the court please, on the ground that this is selecting and asking for an opinion on the part of an exhibit. This exhibit shows on its face that it has some 66 pages, and he is asking for an opinion on the photography on 3 pages, 6, 7, and 8. In addition to the other objections that we have made, it is totally incompetent, irrelevant and invades the province of the court, doesn't tend to prove or disprove any of the allegations, and this witness certainly hasn't been qualified, [fol. 85] if there is such a way to qualify a witness, which I don't say that there is, certainly hasn't been qualified to testify, and we submit that the selecting of some parts of an exhibit and attempting to offer testimony on that is certainly totally incompetent.

Mr. Granoff: In respect to Mr. Shenker's wishes, the State is prepared to have this witness look at the photographs on each and every page of this publication, if necessary, to give his opinion regarding the quality of the photography portrayed.

Does that meet with your approval?

Mr. Shenker: I am objecting to all of it, I make the additional objection, it is testimony pertaining to a part of the exhibit.

The Court: Go ahead.

Mr. Granoff: The court said you may answer in regard to those pages, sir.

The Witness: Do you want me to look at the entire book?

The Court: I frankly don't know what you mean by good or bad photography.

Mr. Granoff: No, sir. I want to keep within the confines of the court's ruling. I would like to have the witness's opinion as to the quality of the photography work portrayed.

A. It is not art.

[fol. 86] Mr. Shenker: I will ask that that be stricken as not responsive to the question.

The Court: Sustained.

By Mr. Granoff:

Q. I now hand you what has been marked State's Exhibit 82, which is the 1958 issue of Photography Annual. I want you to please examine this carefully, Mr. Atzenweiler, and I want you to give the court your opinion as to the photographic quality of the work portrayed?

The Court: Is that an exhibit?

The Witness: Yes, sir.

Mr. Granoff: Eighty-two.

A. I would say this—

Mr. Shenker: We will offer the same objection to this, Your Honor, that we did to the others.

The Court: It is understood.

Mr. Granoff: I understand that objection goes to the entire line of this questioning.

The Court: Yes.

A. I would say that that book contains, as a whole, some of the finest examples of contemporary photographic work in the United States today.

By Mr. Granoff:

Q. Thank you, sir. Specifically directing your attention to page 124, which the record will show is a picture of a woman in a semi-nude condition, please give us your opinion as to the quality of that photography?

[fol. 87] Mr. Shenker: Same objection, Your Honor.

The Court: Yes. All right.

Same ruling.

A. I think both the technical and intrinsic value is very good.

By Mr. Granoff:

Q. In other words, are you in a position to give the court your opinion as an expert in this field what your opinion is on the mere portrayal of nudity as such?

A. Well, nudity, as such, has been used to teach figure drawing; it has been used under limited circumstances to sell products; and in some other circumstances it has been used to create impressions.

Q. In other words, the mere fact that a picture may be the picture of a nude does not make it bad photography, does it?

A. No.

Q. All right, sir. By the same token, please examine Exhibit 86, the 1957 issue of the Photography Color Annual, and let us have your impression as an expert on that publication?

Mr. Shenker: May the record then show that all of my objections go to this line of questioning, unless there is some special point brought up in a question, then I will just not repeat my objections.

The Court: That will be the understanding.

Mr. Shenker: Thank you.

A. I am familiar with this particular magazine, and to a [fol. 88] lesser degree it exemplifies some very fine photography.

Mr. Shenker: What exhibit is that?

Mr. Granoff: Number 86, Mr. Shenker.

By Mr. Granoff:

Q. Now, again directing your attention to State's Exhibit 224, on which you have already commented, and State's Exhibits 86 and 82, being these color photography annuals, is it not true that they both—all three exhibits portray various degrees of nudity?

A. That is correct.

Q. How do you distinguish, as an expert, these publications from the first exhibit, Number 224, which was shown to you?

A. These here are photographic reproductions, I would say, and with no pretense of portraying mood or artistic lighting or—

Mr. Shenker: That last part will certainly ask for an objection. It is one thing to say what it does and what it is, it is another thing saying there is no pretense of portraying—

The Court: Sustained.

Mr. Granoff: That is all.

Your witness, gentlemen.

Mr. Shenker: I move that all of this witness's testimony be stricken.

The Court: Overruled.

[fol. 89]. Cross examination.

By Mr. Shenker:

Q. I might ask you just this: There has been an age-old dispute between experts as to what is art and what isn't art, isn't that right?

A. What is the dispute?

Q. Hasn't that been going on?

A. Are you telling me, or do you want me to answer?

Q. I am asking you.

A. I am not sure; I think there is a matter of opinion.

Q. You think it is a matter of opinion?

A. I think that over—that art transcends all language barriers, and that everybody understands it; I don't think a few people decree whether art is great or not.

Q. I see. It is a matter of opinion, isn't that right?

A. It is a matter of large opinion.

Q. And the opinion varies between different individuals?

A. I would say art is determined by the large masses of the people, not minorities.

Q. The minorities set themselves up as experts, but the masses determine, isn't that correct?

Mr. Granoff: Just a moment. That question is obviously argumentative, and I think it is quite apparent that this witness has expressed an opinion on this evidence all the way through. It is opinion evidence as an expert. I see [fol. 90] no purpose to this type of cross-examination.

The Court: Overruled.

By Mr. Shenker:

Q. In other words, there are many articles that various people will have different opinions on the quality or merit or lack of merit to the articles, or the commodities, art commodities?

A. That is true of anything.

Q. That is right, and the same thing, of course, is true of photography?

A. It is true of anything.

Q. That is right. It is true of anything. And what might appear to you to be poor photography might appear to me to be excellent photography, isn't that right?

A. That is hardly likely; I mean it is possible.

Q. It is probable, too, isn't it?

A. Not really. If we are—if we have the same background and similar tastes.

Q. You mean, if we have the same background and similar tastes and we have the same training and the same experience?

A. No; not the same experience or training.

Q. But we have the same background?

A. A similar background.

Q. But if we have a different background, then it might strike me completely different than it would strike you, isn't that right?

A. It is very possible.

[fol. 91] Mr. Shenker: That is all.

Cross examination (Continued).

By Mr. Brown:

Q. Sir, would you examine the magazine "Playboy"?

A. Which issues?

Q. Have you September and October issues?

A. No, sir.

Q. Have you ever seen an issue of "Playboy"?

A. I have seen it on the news racks.

Q. Do you know that it travels through the United States Mail, second class mail?

Mr. Granoff: Just a moment, that question is totally incompetent and irrelevant to the issues of this case. We are concerned with the effect of this material on this particular community, and I don't think that that has any bearing whatsoever, what the United States postal authorities have done.

The Court: Overruled.

By Mr. Brown:

Q. Do you know that the magazine travels as second class mail through the United States of America?

A. Sir, I don't know how the magazine travels.

Q. I show you the last page of Exhibit 76, which is the October issue of "Playboy," and ask you if the photograph on that page tends to sell something?

A. I would say that the photograph itself doesn't tend to [fol. 92] sell anything, not the photograph; the entire page might.

Q. The entire page tends to sell something?

A. Yes; I think these definitely—this creates a definite impression.

Q. You are telling His Honor that the picture which appears in the upper left-hand page tends to sell nothing, in your opinion? Well, tell him yes or no.

A. It would be my opinion that this would create an impression and would just tend to sell no article in the picture.

Q. Well, now, tending to sell any article in the picture, would it tend as a whole to sell the gifts that are advertised on that page?

A. It would tend to bring my eye to the page.

Mr. Granoff: May it please the court.

Mr. Brown, I don't want to interrupt you unduly, but I would like to make this objection. I think the court has clearly indicated that it will not entertain any testimony dealing with the purpose behind or the intent behind any particular picture or publication, beyond the quality of the work portrayed. For that reason, I think that these questions are beyond the limits of the court's previous ruling.

Mr. Brown: His Honor ruled that you were entitled to show whether or not a picture tended to sell something. This witness has testified that this picture tends to catch [fol. 93] the eye and direct it to that page. I therefore submit that the testimony is admissible, and I would like to follow it up with another question.

The Court: What is the other question?

By Mr. Brown:

Q. The other question is this: Isn't the intent of advertising catching the eye?

A. You are telling me, or you are asking me?

The Court: He is asking you questions. You are a witness.

The Witness: Well, he sort of put that in my mouth, sir.

The Court: He said "is," he asked the question.

The Witness: Will you rephrase the question?

Mr. Brown: No, sir.

Read the question.

(Thereupon, the reporter read the last question.)

A. I would say that catching the eye plays a great part in advertising; yes.

By Mr. Brown:

Q. Yes, sir, and that picture catches the eye?

A. That picture catches the eye.

Q. You have taken pictures such as that, haven't you?

A. Exactly like that.

Q. Such as that, was my question.

A. In what manner do you mean that, exactly?

Q. Just the way I asked it.

[fol. 94] Mr. Schrader: Do you mean—eye-catching pictures?

The Witness: You mean semi-nude pictures, isn't that what you mean?

By Mr. Brown:

Q. Well, I don't remember that picture being semi-nude. Have you taken pictures such as that?

A. I have taken advertising pictures; yes.

Q. You mentioned taking pictures semi-nude. You have taken them nude, too, haven't you?

A. No, sir.

Q. Never?

A. Not completely unclothed.

Q. Not completely unclothed?

A. What do you consider a nude picture?

Q. Well, have you taken them where they are unclothed that much? Well, you surely can remember that without too much thought.

A. That—possibly.

Q. Yes, sir. Now, is the lighting good or bad on that picture? If it is bad, tell me what is bad about it.

A. It is adequate.

Q. That is one of the tests of good photography, isn't it? Didn't you say that lighting was one of the tests?

A. Lighting depending upon what kind of a mood it creates; yes.

Q. Would you say that girl there was posing or not posing? I think that is another one of the tests you used. [fol. 95] Is she posing or not posing?

A. Yes; that is posed.

Q. I am seeing what other criterion you set up.

A. Of course there are good poses and bad poses.

Q. The criterion was lighting and posing. We have both of those. I direct your attention to a page in Exhibit 34. It is three pages, folded into one, entitled "Miss September, Playboy's Playmate of the Month." Is the lighting there good or bad?

A. In order to qualify the lighting, you have to figure out what the picture is designed for, if the picture is designed, what is it designed to portray?

Q. Is the lighting good or bad?

A. For what that is designed to portray, I would say the lighting is very good.

Q. The lighting is very good. Leave it open. Is the girl posing or not?

A. Very bad pose.

Q. Well, she is posing?

A. No; I don't know. It looks to me like a more casual—

Q. If you don't know whether she is posing, how could it be bad posing?

A. The position is bad. Let me put it that way.

Q. Let me ask you this: One of the tests of commercial value is—I think you said what it is worth in the hand [fol. 96] of the photographer?

A. What did I say?

Q. Didn't you say that one of the tests whether a picture had commercial value was monetary value, what it would be worth in the hands of a photographer?

A. In other words, whether it would sell?

Q. Yes.

A. Yes, of course.

Q. Did you in all of your career ever sell a picture for as much as the man got for that picture?

A. How much did the man get for that picture?

Q. Tell me how much you ever got for one?

Mr. Granoff: That is totally incompetent, Judge. I don't see what that has to do with a—

The Court: Sustained.

By Mr. Brown:

Q. Would you have any idea what a picture like that would sell for?

A. Yes; I have made several.

Q. You have made several?

A. Not like this, but for that publication.

Mr. Granoff: May it please the court, I would like this objection to go to this entire line of questioning. It is a matter of public knowledge that dirt in some angles has financial value to it. I don't think that the monetary value of this is in any way revelant to the issues in this case.

[fol. 97] Mr. Brown: It is the third time the prosecutor has used the words. I think it is not proper for him to refer to any of these exhibits until the court rules, as to whether they are dirt, scum, or filth.

The Court: Overruled.

Go ahead.

By Mr. Brown:

Q. Would you answer the question?

A. What was the last question?

Q. What would you think the value of that picture would be in the hands of a photographer, the money, in money, how much would that be worth?

A. In my hands, it wouldn't be worth a dime.

Q. No, sir, not in your hands. Let's back up and take that: In your hands it wouldn't be worth a dime, because you wouldn't want to sell it?

A. I don't know who I could sell it to; I don't know.

Q. You have no idea what the photographer got for that picture?

A. About fifteen hundred dollars.

Q. Must have been of value then, wasn't it?

A. I don't know who he sold it to.

Q. In your opinion, he got about fifteen hundred dollars?

A. Yes; that is a guess, for that type of space.

Mr. Brown: That is all.

Redirect examination.

By Mr. Granoff:

Q. Mr. Atzenweiler, a few minutes ago you testified that [fol. 98] the lighting in a photograph must necessarily depend upon what the picture is designed to sell, is that right?

A. I think that is very poor.

Q. I want you to tell the court, in your opinion, since Mr. Brown has opened the subject, what that picture is designed to sell?

Mr. Brown: If Your Honor please, I object to that question as beyond the scope of this witness's ability to testify and beyond the ruling of the court.

Mr. Granoff: May it please the court, the entire trend of the cross-examination of this witness has been aimed at that very fact. I think that the State has every right to bring that out.

Mr. Brown: My examination was limited to the art questions, what he considered their value.

Mr. Granoff: The lighting, the artistic values, all of these things have to go to—as Mr. Brown himself put it—what the picture is designed to sell. I would like this witness to tell in his expert opinion what that picture is designed to sell.

Mr. Shenker: We would like to, just as a bystander, but since this is a dispute between the three, we would like to object to it, as far as we are concerned, in the entire hearing. It is totally irrelevant, incompetent, immaterial to the point at issue; this witness is obviously giving an [fol. 99] opinion, or has been called for an opinion, which he has not been qualified to state, and it grows way beyond the qualifications that this witness has testified to.

The Court: I think we are getting into a problem that will eventually be the court's authority. It is foreign to the issues, in my judgment.

Mr. Granoff: Well, Your Honor, I certainly am not trying to take issue with the court. I will abide by the rulings of the court. I would like to bring out this, that the purpose behind the photograph, the things—the impression it intends to create, are all things within the realm of the expert testimony of a photographer, I believe. Please stop me, Mr. Brown, if I am wrong, but I believe that counsel on the other side of the table themselves admitted that whether or not a picture or a publication is designed to sell something is of great material value to the issues in this case, just as his reference to the rear page of this publication was designed to bring out what, if anything, the picture was designed to sell. I would merely like the opportunity of asking this witness the same question.

The Court: I will let you ask him, but I think it is not a matter for this witness to testify to. I think that is the ultimate fact that the court has to determine.

Mr. Shenker: What it amounts to is this: What does he [fol. 100] make out of this picture? What does it mean to him? He is not a representative of the community. He is just one person of the community.

The Court: I am going to permit him to answer.

Mr. Granoff: I am sorry!

The Court: I am permitting him to answer, with the statement that I made just a moment ago.

By Mr. Granoff:

Q. Thank you.

My final question, sir: What is that picture designed to sell?

Mr. Brown: Same objection.

A. Well, that has a rim light, and any time—it is common knowledge when you use a rim light, silhouette, or outlining, the lighting is designed to show the figure, the body.

Q. In other words, your answer is that it is designed to sell the body?

A. That is right.

Mr. Granoff: No further questions.

Mr. Shenker: We will ask to strike that answer, if the court please, on the ground it is totally incompetent, and an opinion.

Mr. Brown: Same motion.

The Court: Well, be overruled.

Recross examination.

By Mr. Shenker:

Q. Just one question: One of the biggest things in advertising, is it not, sir, is to get attention, isn't that right?

A. That is part of the story.

Q. To get attention, isn't that right?

A. That is part of the story.

Q. You may use something that is totally unrelated to the object which you are attempting to sell, in order to draw attention so that persons would read whatever is contained in that book or on that page, isn't that correct?

A. That is—

Q. That is the very basic thing of advertising?

A. That is part of the story.

Q. What is the rest—well, do you know of any better way to advertise than by creating something that will attract the eye or that will draw attention?

A. As I understand it, we are talking about products that are advertised.

Q. Talking about anything.

A. Anything. Dollars and cents today seem to be a very fine way to do it, just great big numbers.

Q. Just put in dollars and cents?

A. With the item advertised, seems to be a good way to do it.

Q. But the purpose is to draw attention?

A. Yes, sir.

Q. That is agreed? That is all I am asking.

A. That is right.

[fol. 102] Q. Regardless of what you use, the purpose is to draw attention?

A. Yes, sir; you have to do that.

Q. Once you draw the attention of the individual, it is for the purpose so he will get interested and buy your product, whether it is a DeSoto automobile, Mercury automobile, or any other product?

A. Yes; you have to draw attention.

Q. Including the sale of a magazine?

A. You have to draw attention.

Mr. Shenker: That is all.

Mr. Granoff: That is all.

(Witness excused.)

DR. STANLEY STUBER, being sworn, testified as follows:

Direct examination.

By Mr. Granoff:

Q. Dr. Stuber, for the record, please state your full name?

A. Stanley R. Stuber.

Q. Where do you live?

A. 7920 Tomahawk Road.

Q. Please tell the court your calling?

A. I am a clergyman.

Q. What denomination?

A. Baptist.

Q. Do you hold any position of honor in the clerical field in this community?

[fol. 103] A. I am the General Secretary of the Council of Churches of Greater Kansas City.

Q. Please tell the court just what the Council of Churches is?

A. The Council of Churches is composed of 224 members, major churches of the community, and the Council is based on membership by churches, and not individuals or clergymen.

Q. I see, it is representative of substantially the entire Protestant community?

A. Yes, sir.

Q. How long have you been a clergyman?

A. About 30 years.

Q. During the course of your ministerial duties are you called upon at any time to give advice or counsel on moral questions?

A. Oh, yes; many times.

Q. Prior to coming to this courtroom did you have an opportunity to examine a substantial number of magazines and books and other printed matter in the office of the Prosecutor here in this courthouse?

A. Yes, I did.

Q. During the course of your examination of this material did you have an opportunity to come to any opinion as to what moral effect the distribution of that material would have on the general Kansas City community?

A. Yes; taken as a whole—

The Court: Just yes.

Mr. Shenker: I understood he had just asked if he had [fol. 104] reached an opinion.

A. Just my personal opinion.

By Mr. Granoff:

Q. You did reach an opinion?

A. Yes; I reached an opinion.

Q. Doctor, I hand you what has been marked as State's Exhibits 67a, 121, 34, 76, and 137. Before you answer this question, please give counsel an opportunity to object, if they desire. This is my question: After examining these magazines, do you have an opinion as to what impact the distribution of those magazines will have on the moral fiber of this community?

Mr. Shenker: We are going to object to it, Your Honor. While he didn't ask what that opinion is, he is leading up to it. We would like to object to that, if the court please, on the ground it is totally incompetent, irrelevant, to the point at issue, and that that witness isn't any more competent than anyone else to testify as to what, if any, effect it would have, and I call Your Honor's attention to State vs. Becker, which was decided by the Missouri Supreme

Court, in dealing with the expert testimony that was—in that instance it happened to be me—that I saw fit to offer in connection with matters of this kind. Your Honor is undoubtedly familiar with the decision of the Supreme Court on that question.

The Court: Yes.

[fol. 105] Mr. Brown: The objection of Mr. Shenker goes to my client. I add, too, that it calls for the ultimate question before the court.

Mr. Shenker: This question would definitely invade the province of the court so far as permitting any witness to give an opinion.

Mr. Granoff: May I make a statement in that connection, too?

I think all of the gentlemen at the counsel table are familiar with State vs. Becker, as I know the court is. In that particular case the Supreme Court of Missouri held that an expert witness could not be used to testify on the fundamental issue which is before the court, namely, whether or not a given publication is obscene. I would like it clearly understood that the State's purpose in putting Dr. Stuber on the stand is not to elicit his opinion as to whether or not these publications are obscene, but as a clergyman, as a man over a period of years who is familiar with the general moral fiber of this community, I merely want him to testify as to what effect, if any, these publications will have upon the general morality if they are circulated. I think that that is distinguishable from an out and out opinion from this witness as to the obscene nature of the publications.

The Court: Well, he hasn't—have you examined those? [fol. 106] The Witness: Yes.

The Court: What was the question?

Mr. Granoff: I asked this witness, Your Honor, in effect, what impact the distribution—

The Court: You asked whether he had an opinion as to what the impact—

Mr. Granoff: Yes; in his opinion what impact the circulation or distribution of these materials would have on the general morals of the Kansas City community.

The Court: All right, the objection will be sustained.

OFFER OF PROOF ON BEHALF OF STATE
AND OBJECTION THERETO

Mr. Granoff: Well, in view of the court's ruling on the question, Your Honor, I think it would be useless for the State to ask Dr. Stuber any further questions. However, the State would like the opportunity of making an offer of proof, and may I also state, Your Honor, that it had been the intention of the State to place on the witness stand Dr. Samuel S. Mayerberg, of Congregation B'nai Jehudah, and also Father O'Brien, of the Catholic church in this community, who would, in essence, testify to the same things that Dr. Stuber would have testified to, and I should like to make an offer of proof at this time on those matters.

The Court: All right.

Mr. Granoff: Let the record show that had the witness Dr. Stanley Stuber been permitted to testify in this case, [fol. 107] his testimony would have been to the effect that a substantial quantity of the material which is in issue in this case would have had a detrimental impact on the moral fiber of the Kansas City community if it were available for general circulation.

Due to the fact that there is such a wealth of exhibits in this case, it would [sic] impossible, absent further actual examination on the stand at this time, and for the purposes of this offer of proof, to state just which publications the doctor would have testified would have had that adverse effect.

In view of the fact that we are dealing, Mr. Shenker, and gentlemen, with such large quantities of material, will you agree that that would have been the extent of the testimony, and it would have been adequate had it been otherwise admissible? I can't refer to the specific publications.

Mr. Shenker: No, I will object to whatever offer of proof you make.

The Court: I think maybe this would clarify it—this is just a suggestion—that he will agree that if the witnesses took the stand that they would testify to what, in effect,

that this witness would testify—not that you are admitting this is admissible—don't agree to anything you don't want to.

[fol. 108] Mr. Shenker: Why doesn't he just do it this way: Just make it an offer of proof that you would call witness so and so, and he would testify so and so, and I will object to the offer of proof. I don't want to agree he would so testify.

Mr. Granoff: I am not asking that. The thing I am asking is that my offer of proof is adequate to the extent that it sufficiently states in the record what the witness would have testified to if he had been permitted to testify, not that you will agree with what he says or that it is admissible. In other words, just merely an offer of proof itself is adequate.

Mr. Shenker: I don't want to be in a position to agree, you just say what your offer of proof is. I don't care how far you go. I will object.

Mr. Granoff: That is the State's offer of proof. Let the record further show that the State had intended to call as witnesses in this case Dr. Samuel S. Mayerberg, of Congregation B'nai Jehudah, and Father O'Brien, the Assistant Superintendent of Catholic Education, and Chairman of the Catholic Legion of Decency. The testimony of these two witnesses would have been substantially the same as the testimony of Dr. Stuber, but due to the fact that the court has made its ruling in regard to the testimony of Dr. Stuber, we are making this offer of proof in lieu of putting [fol. 109] either of those two gentlemen on the stand.

Mr. Shenker: We are objecting to the offer of proof, for the reasons previously given.

The Court: Objection sustained, because that answer would invade the province of this court.

(Recess.)

Mr. Granoff: May it please the court, in view of the rulings of His Honor as to the inadmissibility of certain evidence, the State has no further witnesses to present at this time, and rests its case.

STATE RESTS

[fol. 110] MOTIONS ON BEHALF OF DEFENDANTS FOR RETURN OF PROPERTY, ETC.

Mr. Shenker: At this time, if it please the court, at the close of the introduction of all of the evidence that the State has to offer in support of this—to justify their position, each of the parties aggrieved by this search are moving the court for the return of all of the property, on the ground that there was no showing made here sufficient to show any justification for the search, and are incorporating in our motion all of the grounds which we have previously set up.

This would end the litigation, and we would get our property back.

The Court: Well, I will take this motion under advisement.

Mr. Shenker: Under those circumstances, Your Honor, then we would like to ask in view of the court taking this motion under advisement, we would like to have about three or four days to determine that in the event—as to whether we will decide to offer any evidence in support of our contentions or not, and in the meantime, also forward to the court such written motions as are appropriate, which we received leave of court at the beginning of the case to file.

The Court: All right. The matter will be kept open for further hearing.

[fol. 111] Mr. Shenker: Including the motion that we filed for dismissal—return of the property?

The Court: That is right.

Mr. Shenker: I have one further motion that I should like to make, Your Honor, pending the court's final determination either on the motion for the return of all the property or on the motion of—after all the evidence is in, if we put on or offer evidence, I should like to ask the court at this time for a return of all of the property, excepting the exhibits which have been marked and offered into evidence, which motion is predicated, if it please the court, on the ground that an irreparable injury and damage is being done and will continue, and damages which will

be irreparable insofar as there is no body or individual that I know of at this time that—if it were developed that all or some of the publications were improperly confiscated and that financial losses would be sustained by the individuals—there is no one that they can hold accountable for it, so far as I know at this time, and on that basis and for those reasons I would ask the court to return all of the property, excepting—return now all of the property except those which have been marked as exhibits, and are being held for the court to look into and consider.

The Court: That motion will be taken under advisement, [fol. 112] but my suggestion is to file a motion, physical motion, paper motion.

Mr. Shenker: I will.

The Court: So I will have time to further consider it.

Mr. Granoff: May it please the court, for the sake of the record, of course the State will oppose all of the motions which counsel have indicated they intend to file, and in particular as to the final motion for the immediate return of the material which it has introduced into evidence. The State specifically objects to a return of that material, on the ground that we feel that Section 542.380 and Section 543.400, of the Missouri Revised Statutes, clearly indicate that this property was seized pursuant to duly issued warrants of this court, and therefore we feel that the court is without authority to direct a return of the other material pending a determination as to the obscene character of the exhibits which have been introduced into evidence.

Mr. Shenker: The record may show, Your Honor, that on all these various motions that are made, that in each motion, that they are not exclusive, that I am not abandoning any of the other contentions, but that all of the other contentions are incorporated in each of the motions.

The Court: I understand.

Mr. Brown: I would like to have it understood that the written motions filed this morning, filed by Mr. Shenker, [fol. 113] will be considered as also having been filed by my client, and the other written motions that will be filed later will go to my client as well.

The Court: That will be the understanding.
Is there anything further?

Mr. Granoff: There is nothing further at this time, so far as the State is concerned.

Mr. Shenker: Nothing further at this time so far as the defendant is concerned.

The Court: The court will stand adjourned.

Mr. Granoff: May I merely say this, Your Honor, that in the event that Mr. Shenker, and the other gentlemen here representing these various interests, decide to put on evidence in support of their position, the State reserves the right to put on any rebuttal evidence which we feel is necessary.

The Court: Of course. And the State will have full opportunity to state its position having to do with any of the motions filed, as far as that is concerned, before I rule.

[fol. 114]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,
AT KANSAS CITY, DIVISION No. 9

OPINION—December 12, 1957

On October 10, 1957, pursuant to search warrants issued by this court under Section 542.380 of the Revised Statutes of Missouri, 1949, the Jackson County Sheriff's Office and the Kansas City, Missouri Police Department seized certain books, magazines, and other printed matter, in the possession of a wholesale distributing company, located at 3105 Euclid Avenue, and in the possession of certain retailers located at 5 West 12th Street, 1 East 39th Street, 221 East 12th Street, 123 East 12th Street, and 104 East 10th Street, all located in Kansas City, Jackson County, Missouri.

Pursuant to notices duly posted, as provided for in Section 542.400, Revised Statutes of Missouri, 1949, the owners of said property appeared by attorneys, and a hearing, pursuant to Section 512.410, Revised Statutes of Missouri, 1949, was held on the 23rd day of October 1957.

The following motions, and each of them, having been presented to the Court, after due consideration, are overruled:

- a. Amended Motion of Ted's News Shop and Jack K. Rayburn for Immediate Return of Property Seized and to Quash Search Warrant.

- b. Motion of Jack Gordon for Immediate Return of Property Seized and to Quash Search Warrant.
- [fol. 115] c. Amended Motion of Title News Company and William Marcus for Immediate Return of Property Seized and to Quash Search Warrant.
- d. Amended Motion of Town Book Store and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.
- e. Amended Motion of Ruback's News Stand and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.
- f. Amended Motion of Kansas City Distributors and Homer Smay for Immediate Return of Property Seized and to Quash Search Warrant.

Periodicals, books, magazines, and other printed matter were introduced in evidence as exhibits, and it was stipulated by the parties that the same were kept for the purpose of public sale, distribution and circulation. The court has read and studied each of the exhibits so introduced.

Statutes Applicable

The statutes applicable to the facts in this cause are as follows, to wit: Section 542.380, Revised Statutes of Missouri, reads as follows:

"Upon complaint being made, on oath, in writing, to any officer authorized to issue process for the apprehension of offenders, that any of the property or articles herein named are kept within the county of [fol. 116] such officer, if he shall be satisfied that there is reasonable ground for such complaint, shall issue a warrant to the sheriff or any constable of the county, directing him to search for and seize any of the following property or articles:"....

“(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz: obscene, lewd, licentious, indecent or lascivious books, pam-

phlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained:"

542.420. Disposition of Property

"If the judge or magistrate hearing such cause shall determine that the property or articles are of the kind mentioned in Section 542.380, he shall cause the same to be publicly destroyed, by burning or otherwise, and if he find that such property is not of the kind mentioned, he shall order the same returned to its owner. If it appear that it may be necessary to use such articles or property as evidence in any criminal prosecution, the judge or magistrate shall order the officer having [fol. 117] possession of them to retain such possession until such necessity no longer exists, and they shall neither be destroyed nor returned to the owner until they are no longer needed as such evidence."

The Question to Be Determined by the Court

Were any or all of the publications and printed matter seized kept for the purpose of being sold, published, exhibited, given away, distributed or circulated, obscene, lewd, lascivious, indecent or of an immoral or scandalous character?

Our courts have many times stated the test for determining obscenity in matters such as those before the court. Thus, in the case of *State vs. Mac Sales Company*, Mo. App. 263, S. W. 2d 860, L. c. 863, the St. Louis Court of Appeals said:

"With reference to (4), *supra*, one test of obscenity is whether the article in question tends to deprave and corrupt the morals by inciting 'lascivious' thoughts or arousing the lustful desire of those whose minds are open to such influences and into whose hands such a publication may fall." • • •

Again, in the case of *State vs. Pfenninger*, 76 Mo. App. 313, the Court described obscenity as follows:

"Obscenity is such indecency as is calculated to promote the violation of the law and the general corruption of morals. It is applied to language spoken, written or printed, and to pictorial productions and include what is foul and indecent, as well as immodest, [fol. 118] or calculated to excite impure desires."

The Supreme Court of Missouri, in the case of *State vs. Becker*, 272 S. W., Page 282, decided October 11, 1954, speaking through Judge Conkling, said:

"The words 'indecent, immoral or scandalous' as used in this statute, and particularly as used therein in connection with the words 'obscene, lewd, licentious and lascivious,' are not words of hidden or obscure or uncertain meaning. Those words are not technical terms of the law. The word 'indecent' is a common word of common understanding. It has been defined to mean unfit to be seen or heard; immodest; gross; obscene; offending against modesty and less than immodest; that which would arouse lewd or lascivious thoughts in the susceptible."

Again, the test of obscenity is set forth in 67 C. J., as follows:

"The words of the statute 'obscene, lewd, licentious, indecent, lascivious, immoral, scandalous' are used therein as descriptive of the character of the publication prohibited to be possessed with intent to sell or circulate, are all synonymous of similar meaning. Those descriptive words are neither vague nor indefinite. They are words of common usage and understanding, and as used in this statute, and in the law, they have a meaning understood by all."

After thoroughly studying the exhibits heretofore referred to, and in the light of the tests laid down by the courts of this State, I am of the opinion that the

exhibits described in Schedule "A," which is attached hereto and made a part hereof, are obscene, lewd, licentious, lascivious, indecent, and of an immoral and scandalous character, within the meaning and intent of the Missouri Revised Statutes, 1949, Section 542.380.

It is therefore the order of this court that the above-numbered exhibits, described in Schedule "A" attached hereto, and copies of said exhibits, all in the possession of the Sheriff of Jackson County, shall be retained by said officer, as necessary evidence for the purpose of possible criminal prosecutions, and when such necessity no longer exists that said exhibits, and copies thereof, be then publicly destroyed by burning or otherwise, as provided for by law.

The Court further orders that all exhibits set forth in Schedule "B," which is attached hereto and made a part hereof, and copies of said exhibits, all in the possession of said Sheriff of Jackson County, Missouri, be returned to the owners thereof.

A Judgment has been entered this day in conformity with the views expressed herein.

Ben Terte, Judge.

[fol. 120]

SCHEDULE "A" TO OPINION

State's Exhibit 3	Cabaret, Volume Six
State's Exhibit 4	Modern Man, Volume Seven
State's Exhibit 7	Hep, October, 1957
State's Exhibit 12	Paris Life, December, 1957
State's Exhibit 21	Figure, Autumn
State's Exhibit 22	He, November, 1957
State's Exhibit 23	Monsieur, October
State's Exhibit 25	Model Studies, Volume Nine
State's Exhibit 26	Adam, Volume 1, No. 9
State's Exhibit 28	Adam, Volume 1, No. 11

State's Exhibit 29	Figure, Volume 17
State's Exhibit 30	21 Annual, 1956-57
State's Exhibit 36	The Fair Sex
State's Exhibit 37	Classic Photography, Autumn Issue
State's Exhibit 38	Gala, November
State's Exhibit 39	Sunbathing, October 1957.
State's Exhibit 45	Harem, November 1957
State's Exhibit 47	Master Photography, Winter Issue
State's Exhibit 51	Figure Studies, Number Ten
State's Exhibit 52	Art and Camera, Winter, 1957
State's Exhibit 55	Adam, Volume 1, No. 11
State's Exhibit 57	Modern Man Quarterly, Volume 8
State's Exhibit 59	Modern Man, October, 1957
State's Exhibit 60	American Sunbather & Nudist Leader, October, 1957
[fol. 121]	
State's Exhibit 61	After Dark, December, 1957
State's Exhibit 63	Peter Gowland's Figure Photography
State's Exhibit 64	Modern Sunbathing's Nudist Yearbook, No. 5
State's Exhibit 65	Life Study, No. 12
State's Exhibit 66	Glamor Parade, December, 1957
State's Exhibit 67	Foto-rama, November, 1957
State's Exhibit 74	Modern Man, 1957 Yearbook of Queens
State's Exhibit 77	Peter Basch's Photo Ideas, Number 1
State's Exhibit 78	Photo Annual, '57

State's Exhibit 88	TNT, October, 1957
State's Exhibit 92	American Sunbather & Nudist Leader, October, 1957
State's Exhibit 94	Amateur Screen & Photography, Autumn 1957
State's Exhibit 95	Figure Studies Annual, Number Ten
State's Exhibit 97	Graphic Models, Number 6
State's Exhibit 98	Artists Models, No. 6
State's Exhibit 99	Life Study, No. 12
State's Exhibit 100	Darling Diana
State's Exhibit 102	Sunbathing for Health Magazine October, 1957
State's Exhibit 112	Foto, 29
State's Exhibit 117	Monsieur, October, 1957
State's Exhibit 117-A [fol. 122]	21 Annual, 1956-57
State's Exhibit 118	Gala, November, 1957
State's Exhibit 121	Adam, Volume 1, No. 10
State's Exhibit 124	Introducing Bonnie, No. 2
State's Exhibit 127	Unusual Models, No. 2
State's Exhibit 134	Gallery, Volume 3
State's Exhibit 135	Amateur Art and Camera, Volume 8, No. 3
State's Exhibit 137	Figure Quarterly, Volume Seventeen
State's Exhibit 142	Nifty Gals & Gags, December, 1957
State's Exhibit 143	Modern Glamour Girls, Series No. 1
State's Exhibit 144	Presenting Brandee Kayse, No. 8

State's Exhibit 145	Girls Beautiful, No. 25
State's Exhibit 146	Third Dimension Photos, No. 1
State's Exhibit 187	Dixie Sparkle
State's Exhibit 188	Queens of Hearts
State's Exhibit 189	Exotique, No. 16
State's Exhibit 192	Meet the Girls, Vol. 1, Issue 7
State's Exhibit 193	Gorgeous Model Brandee Kayse
State's Exhibit 194	Modern Sunbathing's Nudist Yearbook, No. 5
State's Exhibit 195	Photography Handbook, 327
State's Exhibit 196	Laurie
State's Exhibit 197	Exotique Photo Album, No. 4
State's Exhibit 198	Bizarre Party, 1957
State's Exhibit 199	Unusual Models, No. 3
State's Exhibit 200	Cynthia
[fol. 123]	
State's Exhibit 201	Buxie, No. 6
State's Exhibit 202	Presenting Carol Haze
State's Exhibit 205	Sweet Sue
State's Exhibit 208	Art Studies, No. 1
State's Exhibit 209	How to Take Glamour Photos, 285
State's Exhibit 210	Peter Basch's Photo Studies, 350
State's Exhibit 211	Presenting Cynthia
State's Exhibit 214	Exotique Photo Album, No. 3
State's Exhibit 215	Salon Photography, 306
State's Exhibit 217	Peter Basch's Glamour Photography, 313
State's Exhibit 218	Modern Man Quarterly, Volume 8

State's Exhibit 224	Photographs
State's Exhibit 226	Photographing the Female Figure, 348
State's Exhibit 227	Prize Winning Photography, 340
State's Exhibit 228	Peter Gowland's Figure Photography, 250
State's Exhibit 230	Exotique, No. 12
State's Exhibit 232	Adrian Presents Nauncy Pierre
State's Exhibit 233	Good Photography, 346
State's Exhibit 234	Adam, Volume 1, No. 11
State's Exhibit 238	Adrian Presents Nauncy Pierre
State's Exhibit 239	Frenchie, Artist Model
State's Exhibit 240	Presenting Rosemary Clark, Art Deluxe, Series No. 2
State's Exhibit 241	Figure Photography, Sculpture, Painting, Volume Thirteen
[fol. 124]	
State's Exhibit 243	Modern Glamour Girls, Series No. 1
State's Exhibit 244	Sunbathing Review, Fall, 1957
State's Exhibit 247	Camera in Paris, by Simon Nathan, No. 343
State's Exhibit 250	Figurette, No. 4
State's Exhibit 255	Figure Photography, Sculpture, Painting, Volume Fourteen
State's Exhibit 257	Are You Over Sixty, Olympian House
State's Exhibit 264	How to Achieve Sex Happiness in Marriage, Henry and Freda Thornton
State's Exhibit 271	The Sexpert's Travel Guide, Derby Press

SCHEDULE "B" TO OPINION

State's Exhibits	State's Exhibits	State's Exhibits
1	49	96
2	50	101
5		
6	53	103
8	54	104
9	56	105
10	58	106
11	62	107
13	67-A	108
14	68	109
15	69	110
16	70	111
17	71	113
[fol. 125]		
18	72	114
19	73	115
20	75	116
24	76	119
27	79	120
31	80	122
32	81	123
33	82	125
	82-A	
34	83	126
35	84	128
40	85	129
41	86	130
42	87	131
43	89	132
44	90	133
46	91	136
48	93	138
139	173	229
140	174	231
141	175	235
147	176	236
148	177	237
149	178	

State's Exhibits

State's Exhibits

State's Exhibits

150	179	242
151	180	245
[fol. 126]		
152	181	246
153	182	248
154	183	249
155	184	251
156	185	252
157	186	253
158	190	254
159	191	256
160	204	258
161	205	259
162	206	260
163	207	261
164	212	262
165	213	263
166	216	265
167	219	266
168	220	267
169	221	268
170	222	269
171	223	270
172	225	272
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[fol. 127]

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI,
AT KANSAS CITY, DIVISION NO. 9

JUDGMENT—December 12, 1957

On this 12th day of December 1957, this cause having heretofore been duly submitted to the Court upon the pleadings, certain motions having been presented, and the evidence and proofs having been adduced, and the Court hav-

ing duly and carefully considered the same, it is, on the whole record,

Ordered and Adjudged:

(1) That the following motions, and each of them, be and hereby are overruled:

- (a) Amended Motion of Ted's News Shop and Jack K. Rayburn for Immediate Return of Property Seized and to Quash Search Warrant.
- (b) Motion of Jack Gordon for Immediate Return of Property Seized and to Quash Search Warrant.
- (c) Amended Motion of Title News Company and William Marcus for Immediate Return of Property Seized and to Quash Search Warrant.
- (d) Amended Motion of Town Book Store and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.
- (e) Amended Motion of Ruback's News Stand and Harvey Hammer for Immediate Return of Property Seized and to Quash Search Warrant.
- [fol. 128] (f) Amended Motion of Kansas City Distributors and Homer Smay for Immediate Return of Property Seized and to Quash Search Warrant.

(2) State's Exhibits listed and described in Schedule A attached hereto and made a part hereof, and all copies thereof before this Court pursuant to the oral stipulation of counsel heretofore entered into in open court on the 23rd day of October, 1957, are hereby declared to have been kept for the purpose of public sale, distribution and circulation, and are further declared obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380*. Said exhibits, and all copies thereof before this Court, shall be retained by the Sheriff of Jackson County, Missouri, or by his deputies, as necessary evidence for the purpose of possible criminal prosecution or prosecutions, and, when such necessity no longer exists, said

Sheriff, or his deputies, shall publicly destroy the same by burning within thirty days thereafter.

(3) State's Exhibits listed in Schedule B attached hereto and made a part hereof, and all copies thereof before this Court pursuant to the aforesaid oral stipulation of counsel, shall be returned forthwith by the Sheriff of Jackson County, Missouri, or by his deputies, to the rightful owner or owners thereof.

It Is So Ordered.

Ben Terte, Circuit Judge.

[fol. 129] (Schedules "A" and "B" referred to in the above Judgment are not attached, but may be found in their entirety on pages 120 through 126.*)

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

JOINT MOTION OF KANSAS CITY NEWS DISTRIBUTORS AND HOMER SMAY, TED'S NEWS SHOP AND JACK K. RAYBURN, JACK GORDON, TITLE NEWS COMPANY AND WILLIAM MARCUS, TOWN BOOK STORE AND HARVEY HAMMER, AND RUBACK'S NEWS STAND AND HARVEY HAMMER FOR A NEW TRIAL—December 23, 1957

The Kansas City News Distributors and Homer Smay, Ted's News Shop and Jack K. Rayburn, Jack Gordon, Title News Company and William Marcus, Town Book Store and Harvey Hammer, and Ruback's News Stand and Harvey Hammer move the Court to set aside its opinion, judgment and orders of December 12, 1957, to grant them a new trial and to order the immediate return of all property seized. The grounds for this motion are as follows:

(1) The Court erred in finding that the exhibits listed and described in Schedule A and the copies thereof are "obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380.*"

(2) The Court erred in overruling movants' oral motions to dismiss filed at the close of the entire case for the rea-

* These pages refer to side folios in brackets.

son that the evidence was insufficient to sustain the judgment and orders.

(3) The Court erred in applying the tests and standards [fol. 130] of obscenity set forth in its opinion for the reason that these tests and standards are unconstitutional under *Roth v. United States* and *Alberts v. California*, 354 U. S. 476 and *Butler v. Michigan*, 352 U. S. 380, and the application of these tests and standards in determining whether or not the articles seized were obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning of Section 542.380 R. S. Mo. 1949 impaired movants' right of freedom of speech and press in violation of Article I, Section 8 of the Missouri Constitution, and the free speech clause of Amendment I and the due process clause and the privilege and immunities clause of Amendment XIV of the United States Constitution.

(4) The Court erred in finding Section 542.380 and Section 542.400 R. S. Mo. 1949, and Rule 33 of the Rules of the Supreme Court of Missouri constitutional. Those sections and rule are unconstitutional in allowing a search warrant to be issued and property set forth seized ex parte without notice and without any hearing afforded to the owners of the property prior to such seizure, for the reason that it allows a search and seizure of books, pamphlets, and the other publications without notice or any hearing afforded to the owners of the property prior to seizure, for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious or of an immoral or scandalous character, and therefore constitutes a prior restraint or censorship [fol. 131] of said publications, impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, and the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and

seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(5) The Court erred in finding Section 542.380 and Section 542.400 R. S. Mo. 1949, and Rule 33 of the Rules of the Supreme Court of Missouri constitutional. Those sections and rule are unconstitutional as applied in this case for the reason (a) that it allowed movants' periodicals and magazines to be seized by police officers and deputy sheriffs without notice or any hearing afforded to the movants prior to seizure for the purpose of determining whether or not these books, pamphlets and other publications are obscene, lewd, licentious, indecent, lascivious, or of an immoral or scandalous character, (b) that it allowed police officers and deputy sheriffs to decide and make a judicial determination after the warrant was issued as to which of movants' periodicals and magazines were "obscene, lewd, licentious, indecent and lascivious" or were of an "indecent, [fol. 132] immoral and scandalous character" and were subject to seizure, impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clause of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(6) The Court erred in finding the search warrants valid when they were improper upon their face because they are not directed to a person or persons by name, but to a class, and are not directed to any particular peace officer or officers as required by Rule 33.01 of the Rules of the Supreme Court of Missouri.

(7) The Court erred in finding the search warrants valid when they were illegally issued because the complaints for their issuance and the warrants themselves did not contain a description of the personal property to be searched for

and seized in sufficient detail and particularly to enable the person serving the warrant to readily ascertain and identify the same and thereby violated Rule 33.01 (b) of the [fol. 133] Rules of the Supreme Court of Missouri and further did not describe the things to be seized as nearly as may be making each search and seizure unreasonable in violation of Article I, Section 15 of the Missouri Constitution.

(8) The Court erred in finding the search warrants valid when they were illegally issued because they were issued without a finding by the Court that there was probable cause of reasonable grounds for their issuance and there was no proper showing of probable cause and therefore each search and seizure was unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(9) The Court erred for the reason that the property seized is not the type of property whose seizure is authorized by any statute of this State.

(10) The Court erred in finding that the search warrants were valid when they were illegally issued because they authorized a search and seizure of movants' magazines and publications prior to distribution and thereby constituted a prior restraint or censorship of said magazines and publications impairing movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privilege and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(11) The Court erred in finding that the exhibits in Schedule A and the copies thereof were obscene for the reason the magazines and publications seized are not

obscene or otherwise subject to penalty by statute and their seizure and the Court's order for destruction impaired movants' freedom of speech and publication in contravention of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and constituted a violation of Article I, Section 15 of the Missouri Constitution.

(12) The Court erred in finding that the search warrants were valid when they were illegally issued because the complaints for their issuance each allege insufficient facts and was not supported by evidential facts from which a Court could determine the existence of probable cause and [fol. 135] thereby violated Rule 33.01 (a) of the Rules of the Supreme Court of Missouri.

(13) The Court erred in finding that the search warrants were valid when they were void because (a) each constitutes a general warrant to search and seize; (b) each is improper and insufficient on its face; (c) each complaint is not in the proper form prescribed by statute, Rule 33 of the Supreme Court Rules and Article I, Section 15 of the Missouri Constitution, and does not contain the necessary elements needed for the issuance of a valid search warrant; (d) each complaint and search warrant do not state facts constituting probable cause for the issuance of a search warrant; (e) each complaint and the search warrant state mere conclusions and do not particularize any alleged violations of the law which would authorize the issuance of a search warrant; (f) each does not prescribe a definite time for its execution; (g) Section 542.380 R. S. Mo., 1949, is unconstitutional for the reason that it authorized a Clerk of the Court to issue a search warrant and thereby allows a search warrant to issue without a judicial finding of probable cause in contravention of Article I, Section 15 of

the Missouri Constitution; (h) each was issued without proper oath and affirmation as required by Article I, Section 15 of the Constitution of the State of Missouri, as required by the Statutes of Missouri, particularly Section 542.380 R. S. 1949, and as required by Rule 33 of the Rules of the Supreme Court of Missouri; (i) each authorized a [fol. 136] search at night time and (j) each authorized a search within ten days after its issuance.

(14) The Court erred in finding the search warrants valid when there was no probable cause for believing the existence of the grounds on which the warrants were issued.

(15) The Court erred in finding the search warrants valid because the search and seizure were undertaken without probable cause.

(16) The Court erred in finding the search warrants valid because the articles seized were not described in the warrants and the officers were not otherwise lawfully privileged to seize the same.

(17) The Court erred in finding the search warrants valid when the warrants were improperly executed in that (a) the articles seized were not subject to seizure under any statute of Missouri, (b) the police officers and deputy sheriffs who executed the warrants were allowed to substitute their discretion for that of the Court and were allowed to make the judicial determination of what articles were within the meaning of the search warrants and subject to seizure, and (c) the articles seized were not subject to seizure under the freedom of speech and press clause of Article I, Section 8 of the Missouri Constitution, the freedom of speech and press clause of Amendment I of the United States Constitution and the seizure thereby impaired movants' right of freedom of speech and press as [fol. 137] guaranteed by these clauses. Such impairment of movants' speech and press deprived them of their privileges and immunities as citizens and their property without due process of law as guaranteed by the privileges and immunities and due process clauses of Amendment XIV of the United States Constitution. By reason of the foregoing, said search and seizure were unreasonable and con-

stituted a violation of Article I, Section 15 of the Missouri Constitution.

(18) The Court erred for the further reason that by reason of each and every ground heretofore enumerated each search and seizure and each search warrant were unreasonable and violative of movants' rights under Article I, Section 15 of the Missouri Constitution and the due process clause of Amendment XIV of the United States Constitution.

(19) The Court erred for the further reason that by reason of each and every ground heretofore enumerated and by reason of the applicable unreasonable search and seizure each movant is compelled to testify against himself in violation of the self-incrimination clause of Article I, Section 19 of the Missouri Constitution.

(20) The Court erred in finding that the exhibits listed and described in Schedule A and the copies thereof are subject to seizure and destruction because said finding impairs movants' rights of freedom of speech and press in violation of Article I, Section 8 of the Missouri Constitution, [fol. 138] and the free speech clause of Amendment I and the due process clause and the privileges and immunities clause of Amendment XIV of the United States Constitution.

(21) The Court erred (a) in overruling movants' motions and amended motions for immediate return of the property seized and to quash the search warrants, (b) in allowing Exhibits 1 to 277 inclusive to be admitted into evidence and (c) in entering its judgment and order for the reasons set forth in said motions and for the reasons set forth in paragraph 1 to 20 inclusive of this motion which reasons are herein incorporated by reference.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NOTICE OF APPEAL OF HARVEY HAMMER AND
TOWN BOOK STORE—March 31, 1958

Notice is hereby given that Harvey Hammer and Town Book Store appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2,
Missouri, Ch 1-6116.

Louis Wagner, 1014 Argyle Building, Kansas City 6,
Missouri, BA 1-7151, Attorneys for Appellants,
Harvey Hammer and Town Book Store.

[fol. 139]

IN THE CIRCUIT COURT OF JACKSON COUNTY

MEMORANDA OF THE CLERK RE SERVICE OF NOTICES OF APPEAL

I have this day mailed by registered mail a copy of the within notice of appeal to each of the following persons at the address stated:

William A. Collét, Prosecuting Attorney, County Court
House, Kansas City, Missouri;

John M. Dalton, Attorney General, Jefferson City, Mis-
souri.

I have also mailed a copy of the notice of appeal to the Clerk of the Supreme Court, together with the docket fee deposited by appellant.

Dated March 31st, 1958.

Francis M. Cook, Circuit Clerk, By Eileen Robertson,
Deputy Clerk.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF HOMER SMAY AND KANSAS CITY
NEWS DISTRIBUTORS—Filed March 31, 1958

Notice is hereby given that Homer Smay and Kansas City News Distributors appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, CH 1-6116, Attorney for Appellants [fol. 140] Homer Smay and Kansas City News Distributors.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF JACK GORDON—Filed March 31, 1958

Notice is hereby given that Jack Gordon appeals to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2, [fol. 141] Missouri, CH 1-6116, Attorney for Appellant Jack Gordon.

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF HARVEY HAMMER AND
RUBACK'S NEWS STAND—Filed March 31, 1958

Notice is hereby given that Harvey Hammer and Ruback's News Stand appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

[fol. 142] Morris A. Shenker, 408 Olive Street, St. Louis 2, Missouri, CH 1-6116.

Louis Wagner, 1014 Argyle Building, Kansas City 6, Missouri, BA 1-7151, Attorneys for Appellants, Harvey Hammer and Ruback's News Stand.

[fol. 143]

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF WILLIAM MARCUS AND
TITLE NEWS COMPANY—Filed March 31, 1958

Notice is hereby given that William Marcus and Title News Company appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2,
Missouri, CH 1-6116, Attorney for Appellant Wil-
liam Marcus and Title News Company.

[fol. 144]

IN THE CIRCUIT COURT OF JACKSON COUNTY

NOTICE OF APPEAL OF JACK K. RAYBURN AND
TED'S NEWS SHOP—Filed March 31, 1958

Notice is hereby given that Jack K. Rayburn and Ted's News Shop appeal to the Supreme Court of Missouri from the judgment and order entered in this action on December 12, 1957.

Morris A. Shenker, 408 Olive Street, St. Louis 2,
Missouri, CH 1-6116, Attorney for Appellants,
Jack K. Rayburn and Ted's News Shop.

[fol. 145]

IN THE CIRCUIT COURT OF JACKSON COUNTY

ORDER EXTENDING TIME FOR FILING TRANSCRIPT—
June 27, 1958

For good cause shown the time for filing transcript on appeal in the above matter is extended to September 29, 1958.

6-27-58

Ben Terte, Judge.

IN THE CIRCUIT COURT OF JACKSON COUNTY

STIPULATION AS TO EXHIBITS

Come now the parties hereto, by their respective attorneys of record, and stipulate and agree that it is impractical to incorporate the Exhibits into the Transcript on Appeal herein, and that the same may be omitted from said Transcript and separately filed in the Appellate Court.

Loeb H. Granoff, Assistant Prosecuting Attorney.

Morris A. Shenker, Louis Wagner, Attorneys for Defendants.

[fol. 148]

IN THE SUPREME COURT OF MISSOURI

DIVISION NUMBER TWO

No. 46,900

IN RE: SEARCH WARRANT OF PROPERTY AT
5 WEST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

WILLIAM MARCUS AND TITLE NEWS COMPANY

No. 46,901

IN RE: SEARCH WARRANT OF PROPERTY AT
3105 EUCLID, KANSAS CITY, MISSOURI,

—v.—

JACK K. RAYBURN and TED'S NEWS SHOP

No. 46,902

IN RE: SEARCH WARRANT OF PROPERTY AT
1 EAST 39TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and TOWN BOOK STORE

No. 46,903

IN RE: SEARCH WARRANT OF PROPERTY AT
123 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and RUBACK'S NEWS STAND

No. 46,904

IN RE: SEARCH WARRANT OF PROPERTY AT
104 EAST 10TH STREET, KANSAS CITY, MISSOURI,

—v.—

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS

No. 46,905

IN RE: SEARCH WARRANT OF PROPERTY AT
221 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

JACK GORDON

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

Honorable Ben Terte, Judge.

OPINION—July 13, 1959.

These appeals are from proceedings under §§ 542.380-542.420 which provide for the seizure of publications alleged to be obscene and authorize their destruction if, after [fol. 149] a hearing, they are in fact found to be obscene. Six search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County by an officer of the Police Department of Kansas City. One of them was directed against the premises of a business wholesaling newspapers, books and magazines; the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail.

The search warrants were executed on the same day and the returns were filed in court together with an inventory of the publications seized. A copy of the inventory was left with the persons in charge of the premises where the seizure was made. Notices were served upon the interested parties of a hearing to be held in the circuit court to determine whether the property seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of § 542.380 and whether it was subject to destruction pursuant to § 542.420. The claimants of the publications seized filed separate motions for the immediate return of the property seized and to quash the search warrant and a hearing of all issues was had before the trial court sitting without a jury.

By its judgment the trial court overruled the motions to quash the search warrants and found that 100 of the 280 publications in evidence were in violation of the Obscenity Statute, § 542.380. The remaining 180 publications and all copies thereof were ordered to be returned to the claimants. After unavailing motions for new trials, the claimants appealed. The appeals all present the same questions and have been consolidated.

This court has appellate jurisdiction because constitutional questions have been timely and properly presented. Art. V, Sec. 3, Constitution of Missouri 1945; *State v. Becker*, 364 Mo. 1079, 272 S.W.2d 283.

[fol: 150] Section 542.380 deals with the means of determining whether certain property, including publications alleged to be obscene, are of the kind prohibited by law and, insofar as here material, provides that upon a verified complaint a search warrant may be issued to a sheriff or any constable of the county directing him to search for and seize: "(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or in-

directly, when, where, how or of whom any of such things can be obtained; * * *."

Section 542.400 provides that the judicial officer issuing the warrant shall set a day not less than five nor more than twenty days after the date of service and seizure, "for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing." The section further provides for posting a written notice of the hearing on the premises where the property was seized and for delivering a copy of such notice to any person claiming an interest in such property. Section 542.420 authorizes the destruction of the property or articles if they are found to be of the kind mentioned in § 542.380(2).

Supreme Court Rule 33 and particularly 33.01, dealing with procedural aspects of searches and seizures, provides, inter alia, for the seizure of personal property where authorized by statute if the verified complaint filed with the judge or magistrate states facts positively and not upon information and belief.

The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable search and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and that there is a distinction between a

restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most "exceptional cases", citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697-716, 51 S.Ct. 625-631, 75 L.Ed. 1357.

Conceding this much to be true, it must also be recognized as stated in *Near v. Minnesota*, supra, that "the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted", 51 S.Ct. 628; that "the protection even as to previous restraint is not absolutely unlimited", and that "the primary requirements of decency may be enforced against obscene publications." 51 S.Ct. 631. Also, in *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, the Supreme Court held "that obscenity is not within the area of constitutionally protected speech or press." In *State v. Becker*, 364 Mo. 1079, 272 S.W.2d 283, 288-9, this court held: "It has been long held that the right of freedom of speech is subject to the state's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances." The constitutionality of the penal obscenity statute, § 563.280, was attacked in the *Becker* case and it was held, inter alia, not to impair the constitutional guarantees of freedom of speech and press.

We cannot accept the appellants' contention that: "The possessor of publications should have the right to circulate his material subject to any criminal or other sanctions if the matter offends any governing obscenity such as Section 563.280, R. S. Mo. 1949."¹ Relegating the state to

¹ Section 563.280, insofar as here pertinent, provides:

"Every person who shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, . . . shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned not more than one year in the county jail, or both; . . ."

punishment of the fait accompli would overlook and neglect entirely government's right and duty to protect the public from character contamination and its unfortunate consequences. If obscenity is as destructive and weakening to the moral fiber as the federal and state governments have always considered it, then its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of a community. The courts have never hesitated to enjoin potential menaces to [fol. 153] public health or to approve the vaccination or inoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented. The contention stated has been decided adversely to the appellants in the Becker case, *supra*, as well as the Kingsley case which we shall now consider.

All of the constitutional questions here presented have been resolved adversely to the appellants' contention by *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469. This was a proceeding under the New York statute which is similar to that of Missouri. The New York act provided that upon a complaint being filed the issuance of a temporary injunction against the circulation of publications alleged to be obscene was authorized. If the court found the material to be obscene, a permanent injunction against its distribution could be issued and an order made for the destruction of the material. The Supreme Court of the United States held that the New York statute was not unconstitutional. It was held, 77 S.Ct. 1328(6), that the Fourteenth Amendment did not restrict the states to the use of criminal processes in seeking to protect its people of dissemination of pornography. The New York statute was held not to amount to prior censorship of literary products and not to violate the freedom of thought and speech protected by the Fourteenth Amendment.

The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor

more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint [fol. 154] in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied.

Apart from the judgment formally entered, the trial court filed in the office of the clerk of the circuit court a memorandum entitled "Opinion" in which the court, inter alia, set out the applicable statutes and, in connection with the test for determining whether the publications were obscene, lewd, lascivious, licentious, indecent and of an immoral character, cited and quoted from *State v. Mac Sales Company*, Mo.App., 263 S.W.2d 860, 863, *State v. Pfenninger*, 76 Mo.App. 313, 317, and *State v. Becker*, 346 Mo. 1079, 272 S.W.2d 283, 287. The appellants assert that the trial court applied the tests and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in *Roth v. United States* and *Alberts v. California*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 1498, and *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. It should be noted that the trial court's opinion states and *the judgment holds* that the 100 exhibits listed were obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character "within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380*."

[fol. 155]. The appellants are mistaken in their view of the holding of the *Becker* case which is controlling and the only one we need to discuss. They say the standard adopted was the effect of isolated portions of the publication upon particularly susceptible persons which has been construed

to be the rule announced in *Regina v. Hicklin*, 1868, L.R. 3 Q.B. 360, one of the authorities discussed in *Becker*. Regardless of the present validity of the *Hicklin* rule, that was not the standard applied in the *Becker* case. In announcing the mode of determination the court stated, 272 S.W.2d 286: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." In this interpretation of *Becker*, this court is fortified by the opinion of the Supreme Court of the United States. In the *Roth and Alberts* case, the *Becker* case is listed as one of the decisions which has rejected the *Hicklin* test and substituted this standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. 489, marginal note 26. Appellants' claim of error is denied.

Moreover, appellate review in a nonjury case is upon both the law and the evidence, as in actions of an equitable nature, and a trial court's memorandum or written opinion is not binding and preclusive even if deemed a statement of grounds of decision. *Grapette Co. v. Grapette Bottling Co.*, Mo.App., 286 S.W.2d 34, 36; *Fort Osage Drainage District of Jackson County v. Jackson County, Mo.*, 275 S.W.2d 326, 328; *Hammond v. Crown Coach Co.*, 364 Mo. 508, 263 S.W.2d 362, 366; *Hilmer v. Decher*, Mo.App., 183 S.W.2d 321, 326; 510.310-2.

The appellants next contend that the complaints and the search warrants issued pursuant thereto violated the search and seizure of the Missouri Constitution, Art. I, Sec. 15, and [fol. 156] Supreme Court Rule 33.01(b) in that (1) they did not describe the publications "to be searched for and seized in sufficient detail, and in particularity, to enable the person serving the warrant to readily ascertain and identify the same" and (2) the warrants were issued without a sufficient showing of probable cause. Both the complaints and the search warrants described the publications in the language of the statute, 542.380(2). The constitution protects against "unreasonable searches and seizures" and provides that no search warrant "shall issue without describing the place to be searched, or the person or thing to

be seized, as nearly as may be; nor without probable cause" Rule 33.01(b) provides that the search warrant must describe the place and property "in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

It is *unreasonable* searches and seizures that are prohibited by the constitution, so the determination must be whether the description of the publications was reasonably definite and particular considering the nature and character of the property involved. The proceeding under these statutes are essentially proceedings in rem having for their purpose the seizure and destruction of obscene material, gambling equipment and devices and the other prohibited property mentioned in 542.380. The general rule distinguishing the particularization of property description required in this class of cases is well stated in 79 C.J.S. 861, Searches and Seizures, § 73f, as follows: "*Specific property; property of specified character.* Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other; but, if the purpose is to seize, not specified property, but property of a specified character, which, by reason of its character and of the place where, and the circumstances [fol:157] under which, it may be found, if found at all, would be illicit, a description would be unnecessary and, ordinarily, impossible, except as to such character, place, and circumstances."

In 47 Am.Jur. 524, Searches and Seizures, § 37, there is this further statement: "A description of the property to be seized need not be technically accurate nor necessarily precise; and its nature will necessarily vary according to whether the identity of the property, or its character, is the matter of concern. Further, the description is required to be specific only so far as the circumstances will ordinarily allow. Thus, under a statute authorizing searches for gaming apparatus or implements, it is not sufficient to describe the property as goods, wares, and merchandise, or as chattels generally; but a search warrant commanding the seizure of 'gambling implements and apparatus used, kept, and provided to be used in unlawful gambling' on certain premises and in a certain building, is sufficiently

definite. So, in the case of warrants to search for smuggled goods or for lottery tickets, a general description is deemed sufficient."

In *State v. Cook*, 322 Mo. 1203, 18 S.W.2d 58, a search warrant requiring the officers to seize "all intoxicating liquors" found on the premises was held sufficiently definite and not to deprive the defendant of his "right to a trial by jury on the issue of the intoxicating character of the liquor seized." In *North v. State*, 159 Fla. 854, 32 So.2d 915, a warrant describing the property as "gambling implements and devices used for the purpose of gaming and gambling" was held sufficient. In *Cagle v. State*, 147 Tex.Cr. 354, 180 S.W.2d 928, a warrant describing the property as implements being kept for: "The establishment and operation of a lottery, and the keeping and exhibiting of a policy game" was held sufficient to justify the seizure of a variety of [fol. 158] things used in conducting a policy game. In *Frost v. People*, 193 Ill. 635, 61 N.E. 1054, a warrant describing the property as "gaming instruments and apparatus" was held sufficient.

In the circumstances of this case we hold the search and seizure was not unreasonable for lack of a sufficient description of the property to be seized.

With respect to probable cause, the separate complaints or applications for the search warrants, which were sworn to by a lieutenant of the Kansas City Police Department, were presented to the Circuit Court by the police lieutenant and an assistant prosecutor of Jackson County. The complainant swore to the facts "of his own knowledge" and the court made a finding that there was probable cause to believe the allegations of the complaint to be true and that there was probable cause for the issuance of the search warrants. Supreme Court Rule 33.01 further defines the statutory procedure and provides that the judicial officer shall issue the warrant if the complaint is verified and supported by affidavits "stating evidential facts from which such judge or magistrate determines the existence of probable cause", but it also authorizes the issuance of the warrant if complaint states the facts "positively and not upon information and belief" as was done in this case. We deem the factual

allegations sufficient to support the finding of probable cause and the assignment of error is denied.

The search warrants were directed "to any peace officer in the state of Missouri." The appellants assert that this was improper and violative of their rights under Art. I, Sec. 15, of the Missouri Constitution and Supreme Court Rule 33.01 in that the warrants were not directed to a particular peace officer or officers by name. The constitution does not specify to whom a search warrant shall be addressed and § 542.380 provides that the judicial officer shall issue the warrant "to the sheriff or any constable of the county." Rule 33.01 provides the judge or magistrate shall [fol. 159] issue the search warrant "directed to any peace officer." Rule 33.02 provides: "Every such search warrant shall be executed by a peace officer and not by any other person." Section 542.290 provides: "Every such [search] warrant shall be executed by a public officer, and not by any other person."

In this regard the appellants rely upon *United States v. Kohlman*, 51 F.2d 313, which involved a federal search warrant in a prohibition case. It was held that a search warrant should be directed to a person or persons by name and not to a class and that it could only be executed in accordance with Title 11, Sec. 7, of the Espionage Act which provided that a federal search warrant may be served "by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it." 40 Stat. 229. Obviously, neither the statute nor the decision is controlling in this matter of state law.

The appellants make no contention that the warrants were served by any one without authority, but simply that the warrant was "improper on its face." The record shows the warrants were executed by deputy sheriffs of Jackson County together with officers of the Kansas City Police Department. We find no merit in appellants' contention and it is denied.

The appellants' remaining assignment is that the trial court erred in finding that the publications in question are obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of § 542.380. As we have previously pointed out the Missouri rule as applied

in the Becker case is in accord with the standard approved by the Supreme Court of the United States in the Roth and Alberts case, which is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [fol. 160] prurient interest." 354 U.S. 489. We have also held that the trial court's opinion or memorandum cannot be used to contradict the judgment formally entered even if it were inconsistent with the judgment; however, we do not so construe it.

It is impossible to adequately describe these exhibits and quite unnecessary. It is sufficient to say of them generally that they consist of pictures of young women, naked or nearly so, in suggestive and provocative poses with emphasis on bust development and lustful entreaty. The legends accompanying the pictures and other printed material add to the prurient interest created. It is stated on some of the publications that they are for artists and photographers or for some legitimate purpose and restricted use. However, the dominant character of the publications and the place and manner in which they were exposed for sale belie this thin disguise. Generally, the technical information on picture taking in these publications is less than that found on the leaflet in a roll of new film or in the pamphlet that accompanies the purchase of a modest camera. No one can seriously contend that any great work of art, literature, ideas or information will be lost to the world if these publications are not disseminated.

Our review of the evidence in cases tried upon the facts without a jury is "as in suits of an equitable nature" and the "judgment shall not be set aside unless clearly erroneous." Section 510.310-4. We have examined the exhibits and applied the tests approved in the Becker and Roth cases. While opinions may vary with regard to the proper classification of publications in that penumbral area between art and pornography, we do not find the judgment of the trial court to be "clearly erroneous" in any respect.

Accordingly the judgment is affirmed.

Eager, J. & Broaddus, Sp.J. concur

Clem F. Storekman, Presiding Judge.

[fol. 161]

IN THE SUPREME COURT OF MISSOURI, DIVISION TWO

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING AND GRANTING
MOTION TO TRANSFER TO THE COURT EN BANC—

September 14, 1959

The Court having seen and considered the motion of the appellants for a rehearing herein, doth order that said motion be, and the same is hereby overruled. The Court also having seen and considered the motion of the appellants to transfer said consolidated causes to the court en banc, doth order that the motion be, and it is hereby sustained.

[fol. 162]

[File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

EX BANC

No. 46,900

IN RE: SEARCH WARRANT OF PROPERTY AT
5 WEST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

WILLIAM MARCUS and TITLE NEWS COMPANY

No. 46,901

IN RE: SEARCH WARRANT OF PROPERTY AT
3105 EUCLID, KANSAS CITY, MISSOURI,

—v.—

JACK K. RAYBURN and TED'S NEWS SHOP

No. 46,902

IN RE: SEARCH WARRANT OF PROPERTY AT
1 EAST 39TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and TOWN BOOK STORE

No. 46,903

IN RE: SEARCH WARRANT OF PROPERTY AT
123 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

HARVEY HAMMER and RUBACK'S NEWS STAND

No. 46,904

IN RE: SEARCH WARRANT OF PROPERTY AT
104 EAST 10TH STREET, KANSAS CITY, MISSOURI,

—v.—

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS

No. 46,905

IN RE: SEARCH WARRANT OF PROPERTY AT
221 EAST 12TH STREET, KANSAS CITY, MISSOURI,

—v.—

JACK GORDON

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

OPINION—March 14, 1960

Terte, Judge.

These appeals are from proceedings under §§ 542.380-542.420 which provide for the seizure of publications al-

leged to be obscene and authorize their destruction if, after [fol. 163] a hearing, they are in fact found to be obscene. Six search warrants were obtained on October 10, 1957, from the Circuit Court of Jackson County by an officer of the Police Department of Kansas City. One of them was directed against the premises of a business wholesaling newspapers, books and magazines; the remaining five warrants were for premises on which were conducted displays and sales of such publications at retail.

The search warrants were executed on the same day and the returns were filed in court together with an inventory of the publications seized. A copy of the inventory was left with the persons in charge of the premises where the seizure was made. Notices were served upon the interested parties of a hearing to be held in the circuit court to determine whether the property seized constituted obscene, lewd, licentious, indecent, or lascivious material within the meaning of § 542.380 and whether it was subject to destruction pursuant to § 542.420. The claimants of the publications seized filed separate motions for the immediate return of the property seized and to quash the search warrant and a hearing of all issues was had before the trial court sitting without a jury.

By its judgment the trial court overruled the motions to quash the search warrants and found that 100 of the 280 publications in evidence were in violation of the Obscenity Statute, § 542.380. The remaining 180 publications and all copies thereof were ordered to be returned to the claimants. After unavailing motions for new trials, the claimants appealed. The appeals all present the same questions and have been consolidated.

This court has appellate jurisdiction because constitutional questions have been timely and properly presented. Art. V, Sec. 3, Constitution of Missouri 1945; *State v. Becker*, 364 Mo. 1079, 272 S.W.2d 283.

[fol. 164] Section 542.380 deals with the means of determining whether certain property, including publications alleged to be obscene, are of the kind prohibited by law and, insofar as here material, provides that upon a verified complaint a search warrant may be issued to a sheriff or

any constable of the county directing him to search for and seize: "(2) Any of the following articles, kept for the purpose of being sold, published, exhibited, given away or otherwise distributed or circulated, viz.: obscene, lewd, licentious, indecent or lascivious books, pamphlets, ballads, papers, drawings, lithographs, engravings, pictures, models, casts, prints or other articles or publications of an indecent, immoral or scandalous character, or any letters, handbills, cards, circulars, books, pamphlets or advertisements or notices of any kind giving information, directly or indirectly, when, where, how or of whom any of such things can be obtained; * * *."

Section 542.400 provides that the judicial officer issuing the warrant shall set a day not less than five nor more than twenty days after the date of service and seizure, "for determining whether such property is the kind of property mentioned in section 542.380, and shall order the officer having such property in charge to retain possession of the same until after such hearing." The section further provides for posting a written notice of the hearing on the premises where the property was seized and for delivering a copy of such notice to any person claiming an interest in such property. Section 542.420 authorizes the destruction of the property or articles if they are found to be of the kind mentioned in § 542.380(2).

Supreme Court Rule 33 and particularly 33.01, dealing with procedural aspects of searches and seizures, provides, inter alia, for the seizure of personal property where authorized by statute if the verified complaint filed with the judge or magistrate states facts positively and not upon information and belief.

The appellants charge that these statutes and the court rule are violative of their constitutional rights of freedom of speech and press guaranteed by Art. I, Sec. 8, Constitution of Missouri 1945, and Amendment I of the United States Constitution as made applicable by the privileges and immunities and due process clauses of the Fourteenth Amendment of the United States Constitution, and guaranteed by the provisions of Art. I, Sec. 15, of the Missouri Constitution protecting them against unreasonable search

and seizures. They say that the seizure without notice and an opportunity to be heard prior to seizure constitutes a prior restraint or censorship of the publications and allows the police officers and deputy sheriffs to make a judicial determination after the warrant was issued as to which of the appellants' periodicals and magazines were violative of the obscenity statutes and therefore subject to seizure. The appellants assert that freedom of speech and press occupy a preferred position among our constitutional guarantees, *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292, and that there is a distinction between a restraint imposed before circulation of a publication and a penalty imposed by reason of its circulation and that prior restraints can be justified only in most "exceptional cases", citing *Near v. Minnesota ex rel. Olson*, 283 U.S. 697-716, 51 S.Ct. 625-631, 75 L.Ed. 1357.

Conceding this much to be true, it must also be recognized as stated in *Near v. Minnesota*, supra, that "the authority of the state to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted", 51 S.Ct. 628; that "the protection even as to previous restraint is not absolutely unlimited", and that "the primary requirements of decency may be enforced against obscene publications." 51 S.Ct. 631. Also, in *Roth v. United States*, 354 U.S. 476, 485, 77 S.Ct. 1304, 1309, the Supreme Court held "that obscenity is not within the area of constitutionally protected speech or press." In *State v. Becker*, 364 Mo. 1079, 272 S.W.2d 283, 288-9, this court held: "It has been long held that the right of freedom of speech is subject to the state's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances." The constitutionality of the penal obscenity statute, 563.280, was attacked in the *Becker* case and it was held, inter alia, not to impair the constitutional guarantees of freedom of speech and press.

We cannot accept the appellants' contention that: "The possessor of publications should have the right to circulate his material subject to any criminal or other sanctions if the matter offends any governing obscenity such as Sec-

tion 563.280, R. S. Mo. 1949."¹ Relegating the state to punishment of the fait accompli would overlook and neglect entirely government's right and duty to protect the public from character contamination and its unfortunate consequences. If obscenity is as destructive and weakening to the moral fiber as the federal and state governments have always considered it, then its dissemination should be prevented just as certainly as the spread of disease germs should be curbed among the members of a community. The courts have never hesitated to enjoin potential menaces to [fol. 167] public health or to approve the vaccination or inoculation of school children and others when reasonably required. Obviously, a state government does not have to permit the homes of its citizens to be destroyed by fire when the arson can be reasonably prevented. The contention stated has been decided adversely to the appellants in the Becker case, *supra*, as well as the Kingsley case which we shall now consider.

All of the constitutional questions here presented have been resolved adversely to the appellants' contention by *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469. This was a proceeding under the New York statute which is similar to that of Missouri. The New York act provided that upon a complaint being filed the issuance of a temporary injunction against the circulation of publications alleged to be obscene was authorized. If the court found the material to be obscene, a permanent injunction against its distribution could be issued and an order made for the destruction of the material. The Supreme Court of the United States held that the New York statute was not

¹ Section 563.280, insofar as here pertinent, provides:

"Every person who shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, * * * shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned not more than one year in the county jail, or both; * * *"

unconstitutional. It was held, 77 S.Ct. 1328(6), that the Fourteenth Amendment did not restrict the states to the use of criminal processes in seeking to protect its people of dissemination of pornography. The New York statute was held, not to amount to prior censorship of literary products and not to violate the freedom of thought and speech protected by the Fourteenth Amendment.

The differences in the Missouri and New York statutes are in degree and not of kind. The New York statute provides for a hearing within one day after seizure and a decision within two days after hearing; the Missouri statute provides that the hearing shall be not less than five nor more than twenty days after the seizure. This provision may redound to the benefit of the owners of the publications in preparing their cases for trial. There is no complaint in this case that the appellants sought or desired an earlier hearing and it was refused. It has not been demonstrated that the difference in time of hearing is unreasonable. While publications are seized under the Missouri statute, no temporary injunction is issued as under the New York law. The dealers may continue to sell under the Missouri act if they have or can obtain the publications and desire to do so. The contention that the statutes and the Court rule are unconstitutional in the respects asserted is denied.

Apart from the judgment formally entered, the trial court filed in the office of the clerk of the circuit court a memorandum entitled "Opinion" in which the court, inter alia, set out the applicable statutes and, in connection with the test for determining whether the publications were obscene, lewd, lascivious, licentious, indecent and of an immoral character, cited and quoted from *State v. Mac Sales Company*, Mo.App., 263 S.W.2d 860, 863, *State v. Pfenninger*, 76 Mo.App. 313, 317, and *State v. Becker*, 346 Mo. 1079, 272 S.W.2d 283, 287. The appellants assert that the trial court applied the tests and standards of obscenity stated in those cases and that such tests and standards are violative of their rights of freedom of speech and press under the federal and state constitutions by virtue of the standards adopted by the Supreme Court of the United States in *Roth v. United States* and *Alberts v. California*, 354 U.S.

476, 77 S.Ct. 4304, 1 L.Ed. 1498, and *Butler v. Michigan*, 352 U.S. 380, 77 S.Ct. 524, 1 L.Ed.2d 412. It should be noted that the trial court's opinion states and *the judgment holds* that the 100 exhibits listed were obscene, lewd, licentious, lascivious, indecent and of an immoral and scandalous character "within the meaning and intent of *Missouri Revised Statutes, 1949, Section 542.380.*"

[fol. 169] The appellants are mistaken in their view of the holding of the Becker case which is controlling and the only one we need to discuss. They say the standard adopted was the effect of isolated portions of the publication upon particularly susceptible persons which has been construed to be the rule announced in *Regina v. Hicklin*, 1868, L.R. 3 Q.B. 360, one of the authorities discussed in Becker. Regardless of the present validity of the Hicklin rule, that was not the standard applied in the Becker case. In announcing the mode of determination the court stated, 272 S.W.2d 286: "These questions have been considered and tested objectively as to the effect of these publications in their entirety upon persons of average human instincts." In this interpretation of Becker, this court is fortified by the opinion of the Supreme Court of the United States. In the Roth and Alberts case, the Becker case is listed as one of the decisions which has rejected the Hicklin test and substituted this standard: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S. 489, marginal note 26. Appellants' claim of error is denied.

Moreover, appellate review in a nonjury case is upon both the law and the evidence, as in actions of an equitable nature, and a trial court's memorandum or written opinion is not binding and preclusive even if deemed a statement of grounds of decision. *Grapette Co. v. Grapette Bottling Co.*, Mo.App., 286 S.W.2d 34, 36; *Fort Osage Drainage District of Jackson County v. Jackson County, Mo.*, 275 S.W.2d 326, 328; *Hammond v. Crown Coach Co.*, 364 Mo. 598, 263 S.W.2d 362, 366; *Hilmer v. Decher*, Mo.App., 183 S.W.2d 321, 326; § 510.310-2.

The appellants next contend that the complaints and the search warrants based thereon violated the search and sei-

zure provisions of the Missouri Constitution, Art. I, Sec. 15, [fol. 170] and Supreme Court Rule 33.01(b) in that (1) they did not describe the publications "to be searched for and seized in sufficient detail, and in particularity, to enable the person serving the warrant to readily ascertain and identify the same" and (2) the warrants were issued without a sufficient showing of probable cause. Both the complaints and the search warrants described the publications in the language of the statute, § 542.380(2). The constitution protects against "unreasonable searches and seizures" and provides that no search warrant "shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause * * *". Rule 33.01(b) provides that the search warrant must describe the place and property "in sufficient detail and particularity to enable the officer serving the warrant to readily ascertain and identify the same."

It is *unreasonable* searches and seizures that are prohibited by the constitution, so the determination must be whether the description of the publications was reasonably definite and particular considering the nature and character of the property involved. The proceeding under these statutes are essentially proceedings in rem having for their purpose the seizure and destruction of obscene material, gambling equipment and devices and the other prohibited property mentioned in § 542.380. The general rule distinguishing the particularization of property description required in this class of cases is well stated in 79 C.J.S. 861, Searches and Seizures § 73f, as follows: "*Specific property; property of specified character.* Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other; but, if the purpose is to seize, not specified property, but property of a specified character, which, by reason of its character and of the place where, and the circumstances [fol. 171] under which, it may be found, if found at all, would be illicit, a description would be unnecessary and, ordinarily, impossible, except as to such character, place, and circumstances."

In 47 Am.Jur. 524, Searches and Seizures, § 37, there is this further statement: "A description of the property to

be seized need not be technically accurate nor necessarily precise; and its nature will necessarily vary according to whether the identity of the property, or its character, is the matter of concern. Further, the description is required to be specific only so far as the circumstances will ordinarily allow. Thus, under a statute authorizing searches for gaming apparatus or implements, it is not sufficient to describe the property as goods, wares, and merchandise, or as chattels generally; but a search warrant commanding the seizure of 'gambling implements and apparatus used, kept, and provided to be used in unlawful gambling' on certain premises and in a certain building, is sufficiently definite. So, in the case of warrants to search for smuggled goods or for lottery tickets, a general description is deemed sufficient."

In *State v. Cook*, 322 Mo. 4203, 18 S.W.2d 58, a search warrant requiring the officers to seize "all intoxicating liquors" found on the premises was held sufficiently definite and not to deprive the defendant of his "right to a trial by jury on the issue of the intoxicating character of the liquor seized." In *North v. State*, 159 Fla. 854, 32 So.2d 915, a warrant describing the property as "gambling implements and devices used for the purpose of gaming and gambling" was held sufficient. In *Cagle v. State*, 147 Tex.Cr. 354, 180 S.W.2d 928, a warrant describing the property as implements being kept for: "The establishment and operation of a lottery, and the keeping and exhibiting of a policy game" was held sufficient to justify the seizure of a variety of [fol. 172] things used in conducting a policy game. In *Frost v. People*, 193 Ill. 635, 61 N.E. 1054, a warrant describing the property as "gaming instruments and apparatus" was held sufficient.

In the circumstances of this case we hold the search and seizure was not unreasonable for lack of a sufficient description of the property to be seized.

With respect to probable cause, the separate complaints or applications for the search warrants, which were sworn to by a lieutenant of the Kansas City Police Department, were presented to the Circuit Court by the police lieutenant and an assistant prosecutor of Jackson County. The complainant swore to the facts "of his own knowledge" and the

court made a finding that there was probable cause to believe the allegations of the complaint to be true and that there was probable cause for the issuance of the search warrants. Supreme Court Rule 33.01 further defines the statutory procedure and provides that the judicial officer shall issue the warrant if the complaint is verified and supported by affidavits "stating evidential facts from which such judge or magistrate determines the existence of probable cause", but it also authorizes the issuance of the warrant if complaint states the facts "positively and not upon information and belief" as was done in this case. We deem the factual allegations sufficient to support the finding of probable cause and the assignment of error is denied.

The search warrants were directed "to any peace officer in the state of Missouri." The appellants assert that this was improper and violative of their rights under Art. I, Sec. 15, of the Missouri Constitution and Supreme Court Rule 33.01 in that the warrants were not directed to a particular peace officer or officers by name. The constitution does not specify to whom a search warrant shall be addressed and § 542.380 provides that the judicial officer shall issue the warrant "to the sheriff or any constable of the county." Rule 33.01 provides the judge or magistrate shall [fol. 173] issue the search warrant "directed to any peace officer." Rule 33.02 provides: "Every such search warrant shall be executed by a peace officer and not by any other person." Section 542.290 provides: "Every such [search] warrant shall be executed by a public officer, and not by any other person."

In this regard the appellants rely upon *United States v. Kohlman*, 51 F.2d 313, which involved a federal search warrant in a prohibition case. It was held that a search warrant should be directed to a person or persons by name and not to a class and that it could only be executed in accordance with Title 11, Sec. 7, of the Espionage Act which provided that a federal search warrant may be served "by any of the officers mentioned in its direction, but by no other person, except in aid of the officer on his requiring it." 40 Stat. 229. Obviously, neither the statute nor the decision is controlling in this matter of state law.

The appellants make no contention that the warrants were served by any one without authority, but simply that the warrant was "improper on its face." The record shows the warrants were executed by deputy sheriffs of Jackson County together with officers of the Kansas City Police Department. We find no merit in appellants' contention and it is denied.

The appellants' remaining assignment is that the trial court erred in finding that the publications in question are obscene, lewd, licentious, indecent, lascivious, immoral and scandalous within the meaning and intent of § 542.380. As we have previously pointed out the Missouri rule as applied in the Becker case is in accord with the standard approved by the Supreme Court of the United States in the Roth and Alberts case, which is: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to [fol. 174] prurient interest." 354 U.S. 489. We have also held that the trial court's opinion or memorandum cannot be used to contradict the judgment formally entered even if it were inconsistent with the judgment; however, we do not so construe it.

It is impossible to adequately describe these exhibits and quite unnecessary. It is sufficient to say of them generally that they consist of pictures of young women, naked or nearly so, in suggestive and provocative poses with emphasis on bust development and lustful entreaty. The legends accompanying the pictures and other printed material add to the prurient interest created. It is stated on some of the publications that they are for artists and photographers or for some legitimate purpose and restricted use. However, the dominant character of the publications and the place and manner in which they were exposed for sale belie this thin disguise. Generally, the technical information on picture taking in these publications is less than that found on the leaflet in a roll of new film or in the pamphlet that accompanies the purchase of a modest camera. No one can seriously contend that any great work of art, literature, ideas or information will be lost to the world if these publications are not disseminated.

Our review of the evidence in cases tried upon the facts without a jury is "as in suits of an equitable nature" and the "judgment shall not be set aside unless clearly erroneous." Section 510.310-4. We have examined the exhibits and applied the tests approved in the Becker and Roth cases. While opinions may vary with regard to the proper classification of publications in that penumbral area between art and pornography, we do not find the judgment of the trial court to be "clearly erroneous" in any respect.

Accordingly the judgment is affirmed.

All concur.

Clem F. Storeckman, Presiding Judge.

[fol. 175]

IN THE SUPREME COURT OF MISSOURI

En Banc

No. 46,900-46,905

IN RE: SEARCH WARRANT OF PROPERTY AT
5 WEST 12TH STREET, KANSAS CITY, MISSOURI,

v.

WILLIAM MARCUS, et al.

PER CURIAM OPINION—March 14, 1960

Per Curiam.

In their supplemental brief filed for the hearing before the court en banc the appellants in their points relied on make this additional contention:

"The divisional opinion holding the warrants to sufficiently describe the items to be seized is erroneous in condoning the issuance of a general warrant for the seizure of publications and thereby violates appellants' freedom of speech and press under the First Amendment to the Constitution of the United States and deprives them of their

property without due process of law and their privileges and immunities as citizens as guaranteed by the due process and privileges and immunities clause of Amendment Fourteen of the United States Constitution."

This adds nothing to the scope of the contentions previously made and disposed of in the divisional opinion.

Appellants also cite *Smith v. California*, — U.S. —, 80 S.Ct. 215, 4 L.Ed.2d 205, decided since the decision in division. In the *Smith* case an ordinance which had the effect of imposing a strict criminal liability upon a bookseller possessing an obscene book without a showing that he had knowledge of its contents was struck down as infringing upon constitutional rights. This is not a criminal proceeding and a lack of guilty knowledge is not claimed. Our attention is also called to *Kingsley International Picture Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512. Neither these nor the other cases cited repudiate previous [fol. 177] holdings of the Supreme Court of the United States that obscene material is not within the protection of the constitutional guarantees of freedom of speech and the press. *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498. In fact the *Smith* case reaffirms that proposition. Thus the purpose of the Missouri statute is not unlawful and we hold the procedures employed are in compliance with due process of law and not violative of other constitutional rights. The divisional opinion correctly rules the contentions made.

[fol. 178]

IN THE SUPREME COURT OF MISSOURI

[Title omitted]

ORDER OVERRULING MOTION FOR REHEARING—

April 11, 1960

Now at this day the court having seen and fully considered appellants' motion for a rehearing, doth order that said motion be, and the same is hereby overruled.

[Vol. 179]

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT
5 WEST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

WILLIAM MARCUS and TITLE NEWS COMPANY, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT
3105 EUCLID, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

JACK K. RAYBURN and TED'S NEWS SHOP, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT
1 EAST 39TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

HARVEY HAMMER and TOWN BOOK STORE, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT
123 EAST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

HARVEY HAMMER and RUBACK'S NEWS STAND, Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT
104 EAST 10TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS,
Appellants,

and

IN THE MATTER OF SEARCH WARRANT OF PROPERTY AT
221 EAST 12TH STREET, KANSAS CITY, MISSOURI, Respondent,

vs. Appeal from the Circuit Court of Jackson County.

JACK GORDON, Appellant.

JUDGMENT—March 14, 1960

Now at this day⁴ come again the parties aforesaid, by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be in all things affirmed, and stand in full force and effect; and that the said respondents recover against the said appellants their costs and charges herein expended and have therefor execution. (Opinion filed)

fol. 180] [File endorsement omitted]

IN THE SUPREME COURT OF MISSOURI

En Banc

No. 46,900

IN RE: SEARCH WARRANT OF PROPERTY AT 5 WEST 12TH
STREET, KANSAS CITY, MISSOURI, Respondent,

v.

WILLIAM MARCUS and TITLE NEWS COMPANY, Appellants.

No. 46,901

IN RE: SEARCH WARRANT OF PROPERTY AT 3105 EUCLID,
KANSAS CITY, MISSOURI, Respondent,

v.

JACK K. RAYBURN and TED'S NEWS SHOP, Appellants.

No. 46,902

IN RE: SEARCH WARRANT OF PROPERTY AT 1 EAST 39TH
STREET, KANSAS CITY, MISSOURI, Respondent,

v.

HARVEY HAMMER and TOWN BOOK STORE, Appellants.

No. 46,903

IN RE: SEARCH WARRANT OF PROPERTY AT 123 EAST 12TH
STREET, KANSAS CITY, MISSOURI, Respondent,

v.

HARVEY HAMMER and RUBACK'S NEWS STAND, Appellants.

No. 46,904

IN RE: SEARCH WARRANT OF PROPERTY AT 104 EAST 10TH
STREET, KANSAS CITY, MISSOURI, Respondent,

v.

HOMER SMAY and KANSAS CITY NEWS DISTRIBUTORS,
Appellants.

No. 46,905

IN RE: SEARCH WARRANT OF PROPERTY AT 221 EAST 12TH
STREET, KANSAS CITY, MISSOURI, Respondent,

v.

JACK GORDON, Appellant.

NOTICE OF APPEAL—Filed May 27, 1960

I. Notice is hereby given, pursuant to Rule 10 of the [fol. 181] Revised Rules of the Supreme Court of the United States, that Homer Smay, Kansas City News Distributors, William Marcus, Title News Company, Jack Gordon, Harvey Hammer, Town Book Store, Ruback's News Stand, Jack K. Rayburn, and Ted's News Shop, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Missouri En Banc entered in this proceeding on March 14, 1960, whose finality was suspended by the filing

of a timely petition for rehearing which was overruled on April 11, 1960. This judgment affirmed the judgment of the Circuit Court of Jackson County, Missouri, at Kansas City, of December 12, 1957, which provided that appellants' publications, which had been seized, be retained by the sheriff until such time as they should be publicly destroyed and provided further that appellants' motions for the immediate return of the publications be denied.

This appeal is taken pursuant to 28 U. S. C. §1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

- (1) Consolidated transcript on appeal (pp. 1-146).
- (2) Opinion of Division 2 of the Supreme Court, dated July 13, 1959.
- (3) Order of Division 2 of the Supreme Court transferring the case to the Supreme Court En Banc, dated September 14, 1959.
- (4) Opinion of the Court En Banc, dated March 14, 1960.
- (5) Order of Supreme Court En Banc overruling petition for rehearing, dated April 11, 1960.
- (6) Judgment of the Court En Banc.
- (7) Notice of appeal.

[fol. 182] III. The following questions are presented by this appeal:

- (1) Whether proceedings under Missouri statutes, §§542.380-542.420 R. S. Mo. 1949, preventing dissemination and distribution of publications alleged to be obscene (but not yet found to be offensive by any Court) by providing for their ex parte seizure before a trial or hearing is held for determining if their character warrants condemnation constitutes a censorship and previous restraint of the publications in violation of the constitutional right of freedom of speech and press under Amendment One of the

United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution.

(2) Whether proceedings under Missouri statutes, §§ 2.380-542.420 R. S. Mo. 1949, preventing dissemination and distribution of publications alleged to be obscene (but not yet found to be offensive in any prior judicial determination) by permitting the general seizure by police officers and deputy sheriffs of property specified merely as of an obscene character rather than specified publications constitutes a censorship and previous restraint of the publications in violation of the constitutional rights of freedom of speech and press under Amendment One of the United States Constitution as made applicable to the states by Amendment Fourteen of the United States Constitution.

(3) Whether the Courts below applied unconstitutional tests and standards of obscenity under *Roth v. United States*, and *Alberts v. California*, 354 U. S. 476, and *Butler v. Michigan*, 352 U. S. 380, in determining whether the publications seized were obscene, and thus impaired appellants' right of freedom of speech and press under Amendment One, as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.

[fol. 183] (4) Whether the determination of the issue of obscenity by a trial judge applying unconstitutional tests and standards of obscenity and a review by an appellate court refusing to set aside the trial judge's judgment on the issue of obscenity because it was not "clearly erroneous" impaired appellants' right of freedom of speech and press under Amendment One as incorporated in the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.

(5) Whether the publications seized were obscene under the standard set forth in *Roth v. United States*, and *Alberts v. California*, 354 U. S. 476, and whether the finding that the publications were obscene violated appellants' freedom of speech and press under Amendment One of the United States Constitution, as incorporated in the due process

and privileges and immunities clauses of Amendment Fourteen of the United States Constitution.

(6) Whether Section 542.380 and Section 542.400 R. S. Mo. 1949, and Rule 33 of the Missouri Supreme Court Rules on their face and as applied to this case violate the due process and privileges and immunities clauses of Amendment Fourteen of the United States Constitution incorporating the free speech and press guarantees of Amendment One of the United States Constitution in imposing a prior restraint and censorship of publications by preventing their dissemination and distribution (a) by allowing the seizure of publications by police and deputy sheriffs from retail and wholesale magazine and news vendors without notice and without an opportunity to be heard prior to seizure in order to determine whether such publications are "obscene, lewd, licentious, indecent, or lascivious" or of "indecent, immoral or scandalous character" (b) by allowing police officers and deputy sheriffs under a general search warrant authorizing the seizure of [fol. 184] publications described in the search warrant merely as "obscene, lewd, indecent" or of an "indecent, immoral and scandalous character" to seize appellants' publications and (c) by allowing police officers and deputy sheriffs to decide and make a judicial determination in executing the general search warrants which of appellants' publications were "obscene, lewd, licentious, indecent and lascivious" or were of an "indecent, immoral and scandalous character" and as such were subject to seizure.

Morris A. Shenker, Bernard J. Mellman, Sidney M. Glazer, Attorneys for Appellants.

CERTIFICATE OF SERVICE (omitted in printing).

[fol. 185] Clerk's Certificate (omitted in printing).

[fol. 186]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER POSTPONING CONSIDERATION OF JURISDICTION—
October 10, 1960

Appeal from the Supreme Court of the State of Missouri.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

October 10, 1960.